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REFUSAL TO SUPPLY IN  
EEC LAW

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Thesis submitted for the Degree of LL.M.

UNIVERSITY OF GLASGOW  
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## PREFACE

This study is divided into five main chapters, Chapters Two, and Four of which are subdivided into separate Sections and Parts.

Chapter One is an introduction setting out the basic Treaty framework within which the competition rules are to be considered. The complete text of Articles 85 and 86 are to be found in Appendix I and references to all Regulations dealing with the Communities' competition policy are to be found in Appendix II.

Chapter Two is a general chapter dealing with the basic concepts which are to be found in Articles 85 and 86 of the Treaty. It has been included because the author considers it essential to a proper understanding of the problems to be discussed in Chapter Four that the reader understands the linguistic effect of words and phrases used in the two Articles.

Chapter Three which deals with the economics of the common market has been included because the 'competition law' of the Communities is in fact not so much 'law' as an amalgam of social, economic and political policies and the only role which law has to play in this matter is in giving effect in precise terms to the vague notions expounded by these various disciplines. Without a knowledge, however elementary, of the economic policy considerations which underlie the jurisprudence of the Commission and the Court it is difficult, if not impossible, to draw any conclusions as to the likely future application of previously considered questions.

Chapter Four deals with the application of Article 86 to supply and distribution and contains what can really be considered the

heart of the study. Firstly the question of distribution systems is discussed and thereafter various types of abusive behaviour are considered because it is possible for a dominant firm to ensure that it is able to determine its sales policy without regard for others without having to resort to a refusal to supply as such if it is able to engage in some form of business conduct which, without going so far, is such as can only be considered in effect as a refusal to supply - for instance by the imposition of unreasonable terms and conditions on a would-be purchaser whom the dominant firm did not wish to supply.

The third part of Chapter Four deals with the question of refusal to supply as such, the possible justifications for a refusal to supply and the remedies available to the control authorities.

Finally Chapter Four considers the application of Article 86 to merger situations. Although the direct relevance of the inclusion of such a consideration may not be immediately apparent, the author considers that its inclusion is necessary in order to show the remedies available to the control authorities if a dominant firm sought to by-pass the normal controls and checks of Articles 85 and 86 by the acquisition of all those firms which stood in its way to absolute market domination. The author does not believe that Article 86 can be applied to a merger situation but so long as there is any doubt as to this question, and the Commission consider that they have a duty to examine mergers to ensure that they comply with the desired policy objectives, it is only proper that these matters be discussed.

Chapter Five draws a number of conclusions, particularly in relation to Chapter Four, but also makes a number of general

conclusions with regard to the study as a whole. The conclusions in Chapter Five should, however, be read in conjunction with the conclusions made throughout the study at the end of each relevant Section or Part. The detailed conclusions made other than in Chapter Five are, for the main part, not repeated there.

The study, other than in parts of Chapter Two, concentrates almost exclusively upon Article 86 of the Treaty. This is not because the other Treaty provisions, and in particular Article 85, are not of importance but rather because for reasons of space it is not possible to go into those other Articles with the thoroughness which the author feels would be necessary. Also it is believed that since the study is concerned with 'refusal to supply', emphasis should be placed on express and direct refusals and, other than in the case of joint sales boycott and similar concerted practice, the only refusals which are likely to be encountered in terms of Article 85 are implied refusals to supply - i.e. if the supplier only supplies products through his selective distribution system, there must necessarily be an implied refusal to supply all other would-be customers.<sup>1</sup>

In the study, all references to Articles are to Articles of the EEC Treaty unless stated otherwise and the expressions 'firm', 'enterprise' and 'undertaking' are, except where the context requires otherwise, used interchangeably.

Finally, it should be noted that the study has been prepared with the practitioner clearly in mind. It should, therefore, be understood that this is why there is a search for clarity and an understanding of what the present position with regard to

the law is rather than the mere expression of opinion of what it should be. For the practising lawyer what is required is to know what the law is at any given time so that he can advise his client how he should conduct his business affairs.

The law is stated as at 31st December 1980.

FOOTNOTES:

1. For a consideration of the possible position under Article 85(1) see Bellamy & Child, op cit, pp 81 - 82 and Korah V, op cit p. 60.

## ABBREVIATIONS

CMLR	- Common Market Law Reports
CM/M/I/	- Competition Law in Western Europe and
CM/M/III/	the United States, D.J. Gijlstra, managing
CM/L/	editor, Deventer, 1977
ECR	- European Court Reports
ECSC	- European Coal and Steel Community
EEC	- European Economic Community
JO	- Journal Officiel des Communautés Europeennes
OECD	- Organisation for Economic Cooperation and Development
OJ	- Official Journal of the European Communities
Oil Report	- Report by the Commission on the Behaviour of the Oil Companies in the Community during the period from October 1973 to March 1974, Brussels, December 1975

## SUMMARY

The purpose of the study is to investigate the concept of a refusal to supply in the law of the European Economic Community, to consider the effect of such a refusal, the possible justifications therefor and the remedies open to the control authorities in combatting any undesirable effects thereof. The aim of the study is to provide a readily understood guide to the position such as would assist a practitioner in advising his clients on the conduct of their affairs.

The study is primarily jurisprudentially based; an examination is made of each of the Decisions of the Commission and the judgments of the Court dealing with the problem and a set of tests drawn up for determining the circumstances in which a refusal to supply will be prohibited. An examination of the jurisprudence dealing with directly related topics is also made.

The study considers the basic concepts of market dominance and abuse, and notes the basic economic theory underlying the Community competition system. A consideration is thereafter made of the application of Article 86 to distribution and supply and refusals to supply. Finally a brief consideration of concentration control is included.

It is noted that the position of the dominant firm wishing to organise its selling in a particular fashion is precarious, since it has not only to comply with the requirements of Article 85(1) but has also to consider the possible application of Article 86 to its conduct.

The study concludes that whilst Article 86 is able to deal with refusal to supply in most cases, there exists no doctrine of 'public utility' in the E.E.C. system. Should such a doctrine be required, the study concludes that this is a matter not so much for the Commission and the legal authorities but rather one for political determination.

CHAPTER ONE

INTRODUCTION

This study of the effects of a refusal to sell in terms of the rules of competition of the European Economic Community will begin by outlining the scope of such rules and the manner in which they may be applied.

Article 2 of the Treaty provides a number of tasks which the Community is to have, including the promotion of a harmonious development of economic activities and the raising of living standards. These objectives can, however, provide no more than a general outline of the role of the Community and Article 3 is concerned with some of the areas in which these general objectives are to be ensured.

For our purposes, the important paragraph is paragraph (f) which states that the activities of the Community are to include "the institution of a system ensuring that competition in the common market is not distorted". Whilst this bland statement merely provides the general aim of the competition policy, it forms the basic tenet of that policy and one which is directly referred to in judgments of the Court, as is discussed *infra*.

One of the problems of Article 3(f) however is whether the competition which is not to be distorted is that of 'free' competition or that of 'fair' competition; the system cannot maintain both. 'Free' competition assumes a laissez faire approach to the problem - letting natural market forces of supply and demand find their own levels and ensuring that the strong will prevail over the weak; 'fair' competition on the other hand implies some control of the market to ensure that it develops in accordance with certain pre-determined norms of business behaviour.

As far as the EEC Competition Policy is concerned, the basic approach appears to be that of free competition, whilst having rules - particularly in relation to dominant firms - to ensure that the competitive structure of the market is not irreparably damaged by any use of unfair market behaviour.

In implement of the objectives of Article 3(f), the Treaty contains detailed provisions in Articles 85 - 94 indicating the types of behaviour which generally will and will not be permitted.

Articles 85 - 89 contain provisions applicable to private firms aimed at ensuring that the creation of effective conditions of competition is not hindered by the erection of barriers or restrictions. The maintenance of competition is therefore an essential part of the Community's economic and legal order. Where any question of interpretation of these Articles arises, they are to be interpreted in accordance with Articles 2 and 3(f) of the Treaty.

Similarly, governmental procurement is to be made on the basis of non-discrimination, and Article 90 provides that public enterprises are to be treated no more favourably than private enterprises. However, public enterprises entrusted with the operation of services of general economic interest are exempt from this rule, in so far as it would obstruct the performance, in fact or in law, of those tasks assigned to them.

Article 91 deals with dumping during the transitional period whilst Articles 92 - 94 are designed to ensure that competition between firms in different Member States is not distorted through the granting of state aids.

However, Articles 85-94 merely provide general statements of what will and will not be permitted within the framework of the Treaty and it requires implementing secondary legislation to give effect to those statements. The main piece of implementing legislation is Regulation of the Council No. 17 of 6th February, 1962; Regulation 17/62 which was made by virtue of the powers contained in Article 87 of the Treaty lays down the types of agreement, decision and concerted practice which must be notified to the Commission and gives the Commission guidelines which are to be observed in the taking of formal Decisions under Article 85(3). It also provides for the granting of Negative Clearances stating that there are no grounds for intervention in terms of Articles 85 and 86. Finally the Regulation gives to the Commission wide powers of investigation, requests for information and fines for any breach of the competition rules.

The forms to be used for complaints, notifications and applications for exemptions are laid down in Regulation No 27/62 of the Commission. Regulation 99/63 provides the procedural rules for hearings held by the Commission pursuant to Article 19 of Regulation 17 to ensure that the rights of undertakings are preserved.

There exist special rules for the agricultural sector in Regulation 26/62 and for transport in Regulations 141/62 and 1017/68, since these sectors are specifically excluded from the ambit of Regulation 17/62 by virtue of Article 42 of the Treaty and Article 1 of Regulation 141/62.

Exemption is provided in terms of Article 85 (3) to certain types of Agreement under Regulation of the Council No 19/65

and Commission Regulation 67/67 following thereon, the Council Regulation 2821/72 and Commission Regulation 2779/72 following thereon.

Unlike the general provisions of Article 85(1) as implemented by Regulation 17, a specific period of limitation in proceedings and sanctions is provided to agreements in the transport sector by Regulation 2988/74. The period (which commences on the date on which the infringement is committed) is three years in the case of infringement of the provisions requiring information, or relating to applications or notifications and five years in all other cases.

Extra-statutory concessions are contained in five Commission Notices and one Opinion, although these concessions have no binding force.

There exist provisions similar to Articles 85 and 86 in the Agreements with Greece, Turkey, Austria, Iceland, Portugal, Sweden, Switzerland, Norway, Finland and Israel - although the Greek Agreement has now lapsed on Greece's Accession. In addition, in the Agreements with Austria, Iceland, Portugal, Sweden, Switzerland, Norway, Finland and Israel the Community have made a declaration that they will apply the Treaty competition rules to any practices being assessed; the Turkish Agreement specifically includes the Treaty Rules.

This, therefore, is the framework within which the competition policy of the Community must fit - it is up to the Court and to the Commission to put flesh on the bare bones of the legislation.

CHAPTER TWO  
DEFINITIONS AND ANALYSES

## Introduction

Prior to any discussion as to the economic and legal aspects, causes and effects of a refusal to supply, it is necessary to explain and analyse the basic concepts which underlie the competition policy of the Communities and ascertain the degree to which they may provide a foundation on which the concept of refusal to supply may rest. For this purpose the relevant legal concepts will be related to the main topic of this Study at the end of this Chapter.

As outlined in Chapter One, the basic Treaty provision setting out the necessity of such a Policy is found in Article 3(f). This provision, however, can do no more than provide a statement of intent and it is Articles 85 - 94 which provide the rules which are used to expand the framework of Article 3(f). For the purposes of this study emphasis will be placed on Articles 85 and 86, although, necessarily, reference will be made, if and when considered appropriate, to other Articles of the Treaty.

The full text of Articles 85 and 86 will be found in Appendix 1, but it is expedient for our purposes here to summarise the main elements thereof;

Article 85(1) states that:-

"The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market..."

Article 86 states that:-

"Any abuse by one or more undertakings of a dominant position within the common market or a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States..."

As can be seen from the above extracts there are to be found in Articles 85 and 86 several elements which can be seen as sine qua

non for the application of the competition rules of the Treaty. It is these elements with which this Chapter is concerned.

The Analysis will consider those elements common to both Articles 85 and 86 before turning to deal with Article 86 in detail. Article 85 will not be discussed in more than passing in the analysis.

I. ARTICLES 85 and 86

a. Undertaking

Article 85 states that the agreement, decision or concerted practice necessary to bring the behaviour within the scope of the control therein contained and Article 86 requires that the abuse of a dominant position required to incur the prohibition of that Article, must be between undertakings or by one or more undertakings, as the case may be.

It is therefore fundamental, to the whole system envisaged by the authors of the Treaty, to consider what is meant by the concept of 'undertaking' in Community Law.

Although the linguistic covering in the two Articles is not completely clear it is incontestable, from a practical point of view that it is only behaviour by undertakings with which the Treaty is concerned. Article 90 makes it clear that the rules are equally applicable to public bodies as to private firms and this study will, for this reason, not distinguish between these two groups. It should, however, always be remembered that, because of the special, quasi-governmental functions which this former group often perform, it is particularly important to ensure that competition is not distorted by virtue of governmental priority.

For the purposes of Community antitrust policy, the notion of 'undertaking' encompasses all forms of economic activity which are or have been found to exist in the world of commerce or

manufacture. Hence the sole trader is caught as equally by Articles 85 and 86 as the multi-national corporation, although the sole trader may fall outwith the scope of Article 86 through the nature of his activities. Competition policy applies to all economic activity, irrespective of the form under which such activity is conducted. Certain types of organisation and activities are, however, expressly excluded from the ambit of the restrictive practices legislation and are, therefore, excluded from consideration in this study. The most obvious example of this exclusion is probably the removal of all industrial relations and labour matters from the scope of national rules. For the purposes of Community law, the author doubts whether, in practice although in stricto sensu properly to be included, a Trade Union would be classed as an 'undertaking'.

One of the main problems in this area relates to industrial property rights. The Commission has always treated performing rights societies as undertakings with the meaning of Article 85 and 86<sup>1</sup>. On the other hand, there have been a number of objections from these societies and from the authors who are their members, that these societies are, strictly speaking, too small to be treated as undertakings and should be treated in a way more analagous to a Trade Union. The argument is that the societies perform the same functions for their members as do Trade Unions for theirs and, accordingly, that the practices of the societies should be dealt with as Trade Union practices.

However, the question is not to be resolved from the point of view of the authors, or the societies, but rather by the determination of whether the activities of the society satisfy the market for the services which it controls, in which case the society will

exercise a commercial function and hence be an 'undertaking' within the meaning of Articles 85 and 86.

On the other hand, an author has been held not to be exercising a commercial activity when he exploits his rights through the performing rights society<sup>2</sup>. The author, like a commercial agent<sup>3</sup>, does not exercise any commercial autonomy in the exercise of his rights and a market for his particular services only exists through the medium of the society (This, of course, excludes any commercial function which the author may possess in his relationship with his publisher, agent etc., in the exercise of which function the author is performing an activity commensurate with a status of undertaking under Articles 85 and 86.)

Artistic activities have been held to be sufficient to establish a finding of undertaking in certain cases. In the Deutsche Grammophon Case<sup>4</sup>, the European Court decided that recording artistes were undertakings in the sense of the competition rules of the Treaty as soon as they offered their works for sale on the market. The judgment shows that the question of whether entrepreneurial activity exists will depend on the degree of participation in economic trade and not on whether this participation has been facilitated by performances based on variety or economic origin.

It should perhaps be noted, for the sake of completeness that by virtue of the nature of the Treaty system, the Member States themselves cannot be considered to be 'undertakings' within the meaning of Articles 85 and 86. This does not mean, however, that where the Member States perform commercial activities through commercial or statutory monopolies, or through governmental or other types of national agency, these organisations will not fall under

Articles 85 and 86. Note should be made in this respect of the provisions of Article 90(1) and (2) which provide for certain exemptions to be granted to this type of organisation in specific defined situations<sup>5</sup>.

It should, however, be noted in this context that the question of whether or not an organisation is an 'undertaking' within the meaning of the Treaty rules on competition is not of much practical importance. It would be incompetent to base one's defences to an antitrust action on the premise that the organisation was not an 'undertaking'. There has not been any significant case or Decision in which the non-existence of an undertaking has been of critical importance in granting a negative clearance under Regulation 17/62, an exemption under Article 85(3), or allowing an appeal from a Decision made by the Commission.

In the few cases where it has been decided that the organisation in question does not possess sufficient commercial autonomy to be considered an undertaking independently of any other enterprise, it has been possible to take the Decision against the parent company or against the parent and the subsidiary jointly<sup>6</sup>, or against the subsidiary<sup>7</sup>, or in the case of commercial agency, against the principal.

In general, the rule can be clearly stated that if the organisation or individual performs any tasks or function which has any commercial character, whether for gain or as a public service, then it will be an 'undertaking' as that definition is understood within the meaning of the Treaty rules.

b. Affect trade between Member States

Competition Law is concerned in all systems with the

infringement of some pre-determined norms of behaviour. In national systems the norm is that of fair or free competition within the national territory; in federal systems such as the USA, one criterion for the operation of the antitrust statute is the effect on trade or commerce between the several states or, with a foreign country<sup>8</sup>, inasmuch as the antitrust rules are those of the federal legislature. In the EEC, in terms of Articles 85 and 86, the necessary trigger to bring into play the control provisions, is that the behaviour with which those Articles are concerned (restrictive arrangements and abuse of a dominant position) 'may affect trade between Member States'. Without there being the possibility that the conduct being examined may affect trade between Member States, the Commission, as guardian of the Treaty rules, has no role to play. This provision is thus a sine qua non for the application of Articles 85 et seq.

The starting point is what the Treaty means by 'trade'. The notion is one of more than the purchase and supply of goods. 'Trade' encompasses the production and distribution of all types of product, including agricultural products (to which a special regime is applied by Regulation 26). It includes the provision of services of all types, including those of the liberal professions and those provided by State Agencies and nationalised industries, (under reservation of the fact that Article 37 and/or Article 90 may be applicable to these activities). From a reading of Article 223, it appears that the notion may not extend to those aspects of the defence and security industries to which that Article applies.

For Article 86 the question of whether the abuse of the dominant position which has been found to exist affects trade between Member States will be a question of fact to be determined by examination of the whole circumstances of the case. For the purposes of this study, emphasis will be laid on the judgments and Decisions taken under Article 85 which set down criteria which are equally valid for Article 86.

The cases under Article 85 can be divided into two distinct groups; those where restrictive arrangements were found to exist between undertakings established in two or more Member States, and those in which the arrangements were between firms in the same Member State.

It is easier to see that trade might more likely be affected in the first group than in the second but, as it will be shown, trade may be affected in both cases. In the LTM -v- MBU Case in 1966<sup>9</sup>. the Court stated that the function of this concept was to determine the field of application of the prohibition of Article 85(1), by laying down the condition that it may be assumed that there is a possibility that the realisation of a single market between Member States (which, it will be recalled, is one of the primary functions of the EEC and of the competition rules in particular) might be impeded.

"It is in fact to the extent that the agreement may affect trade between Member States that the interference with competition caused by that agreement is caught by the prohibitions in Community Law found in Article 85, whilst in the converse case, it escapes those prohibitions.

For this requirement to be fulfilled, it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or of fact that the agreement in question may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States".

In the Consten-Grundig Case in July, 1966<sup>10</sup>, the Court stated that

"the fact that an agreement encourages an increase, even a large one, in the volume of trade between States is not sufficient to exclude the possibility that the agreement may 'affect' such trade . . . ."

What this concern is directed at, is the possibility that such 'affecting' of trade might 'harm the attainment of the objectives of a single market between States'.

The LTM -v- MBU judgment, above-mentioned stated further that in considering an agreement

"it is necessary to consider in particular whether it is capable of bringing about a partitioning of the market in certain products between Member States and thus rendering more difficult the interpenetration of trade which the Treaty is intended to create"

From these extracts it can be seen that the basis of analysis of the agreement or other restrictive arrangements between the parties, is such as to make it difficult for the parties to maintain that their arrangement is one which is incapable of having any effect 'direct or indirect, actual or potential' on the pattern of trade between Member States. As has been shown, even if the parties are able to show that the result of their arrangement has been a large increase in trade in the products in question between the States concerned the arrangement will still fall within Article 85 (1). Whether, in such a case, an exemption could be granted under Article 85 (3) is another question entirely<sup>11</sup>.

It appears from the jurisprudence that the major 'effect' with which the control authorities are concerned is the possibility that the restrictive arrangement will lead to the partitioning of the market between the Member States.

Most of the remaining jurisprudence dealing with agreements between firms situated in the same Member State concerns the actions of national trade associations. In the German Ceramic Tiles Discount Agreement Decision, in December, 1970<sup>12</sup>, the Commission considered the practice of granting wholesalers' rebates calculated on the basis of their total purchase of tiles from German producers; the rebate was cumulative and the wholesalers were, therefore more likely to purchase their requirements from German producers in order to obtain the most favourable rebate, notwithstanding the fact that imported tiles were, in general, less expensive than German tiles. The Commission considered that such a rebate system was likely to affect trade between Member States.

"The present decision precisely provokes a concentration of orders of purchasers in the specialised trade in tiles on the German market upon the whole of the producers of that Member State, to the disadvantage of the other producers of the EEC who wish to export tiles to Germany and who are thereby placed, all other things being equal, in a disadvantageous competitive position. That collectively introduced artificial obstacle renders their access to the German market more difficult than it would have been if that decision had not been taken and is, therefore liable to affect trade between Member States in the abovementioned manner.

In the Belgian Central Heating Agreement Decision, in November 1972<sup>13</sup>, the obligation on members of the association to deal only with other members of the (national) association was found to affect trade between Member States since it limited, to a significant extent, the possibilities for producers in other Member States to export to the Belgian market and the possibility of Belgian buyers to import central heating equipment from other Member States.

In the VCH Case<sup>14</sup>, the Court stated clearly that a national agreement could affect trade between Member States :

"An agreement which extends to the whole of the territory of a Member State has, by its very nature, the effect of consolidating a national partitioning, thus hindering the economic interpenetration to which the Treaty is directed and ensuring a protection for the national production".

In the Papier Peints Case<sup>15</sup>, the Court annulled the Decision of the Commission<sup>16</sup> on the ground that it had not adequately shown how trade between Member States was affected. This judgment is, however, unique and it is submitted that it is most unlikely that any future Decision under Article 85 would be annulled for this reason, although a Decision against Hugin<sup>17</sup> under Article 86 was annulled<sup>18</sup> on that ground.

Finally in this Section, mention will be made of the so-called de minimis exception permitted under the Treaty rules. This can, per definitionem, relate only to Article 85, as under Article 86 a de minimis firm could not be condemned.

In the Volk -v- Vervaecke Case<sup>19</sup>, the Court stated that in examining whether an agreement affected trade between Member States, the agreement would fall outwith the prohibition in Article 85 when it had only an insignificant effect on the market, taking into account the weak position which the persons concerned have on the market in question. This view was subsequently approved by the Court in the Beguelin Case<sup>20</sup>.

"to bring into play the prohibition set out in Article 85 the agreement must affect noticeably the trade between Member States and competition."

The Commission's position on agreements of minor importance was set out in its de minimis notice of 27th May 1970<sup>21</sup>, subsequently replaced by the Notice of 29th December 1977<sup>22</sup>. This Notice gives an indication of the criteria, the satisfaction of which will, in general, exclude the agreement from the scope of Article 85 (1). The Notice gives thresholds both in terms of

market share, and in terms of turnover for the establishment of a position of minor importance.

Two very important factors should be noted in this connection, however. Firstly, it is not only the firms which are parties to the agreement which should be considered. If the firms, although in themselves sufficiently small to take advantage of the exclusion provided by the Notice, are members of a large group of undertakings, it is the whole group which will be required to satisfy the thresholds.

Secondly the Notice may be withdrawn by the Commission and it would, therefore, be unwise to rely on it overmuch. The Notice is, of course, also subject to any ruling which the Court may make in a particular case.

In conclusion it can be stated that trade will be 'affected' as in the case of a refusal to supply as discussed in Chapter Four, if, but for the existence of the agreement, decision, concerted practice or abuse of the dominant position, it would have developed in a different way from that in which it actually did.

## II. ARTICLE 86

### a) Dominant Position

#### 1) Monopoly

#### i. General Observations

The O.E.C.D. Glossary of Terms relating to Restrictive Business Practices defines a Dominant Position as:

"The position occupied either  
(a) by a single enterprise, or  
(b) by a group of enterprises between which no effective competition exists, which does not encounter effective competition in a market".

This appears to be a suitable point at which to begin to consider the concept of market dominance.

The purpose of the authorities' control and examination of enterprises considered to possess a dominant position whether, in fact, such a position is held, is clear. Any enterprise which possesses a degree of dominance on a market can act to some degree as if it were a monopolist - the extent to which the behaviour of the dominant firm will approach that of the monopolist will be proportionate to the level of dominance which, in fact, is held.

There appear to be two fundamental criteria by which the possession of a dominant position may be categorised - the power or ability to fix and determine prices unilaterally, and the ability to limit or limit or exclude, to any significant degree, competition. It is the exploitation of this position which is seen as the evil which, above all else, must be avoided. It can only be through the continuous endeavour of enterprises to persuade consumers that it is with that firm that the consumer wishes to conclude a contract, that each participating enterprise is able to mark out its market share. Provided that this 'endeavour' is seen to be sufficiently active, one can state, with an appreciable degree of accuracy, that competition is fulfilling one of its perceived functions - that of a regulatory mechanism for business behaviour.

For the consumer, competition means the possibility of making a choice between the different offers made by the various entrepreneurs on the market, whereby each offer is comprised of a series of individual elements. Each element is, or at least may not be, decisive in influencing the purchasing or selective decision of the consumer, but the whole package will, vis-a-vis the offers of the other sellers, be more desirable to the particular consumer at that point in time. From the fact that each offer has been made up from

a series of elements, a test has been derived by which the existence or non-existence of a sufficient degree of competition can be measured.

Firstly, an investigation of the individual elements has to take place; the question of whether a sufficiency of competition exists, is to be discovered through the investigation of whether these determined elements, taken in their entirety, are sufficient to restrict appreciably the business freedom and independence of any enterprise or enterprises.

It must also be mentioned that the existence or absence of competition is often gauged by the development of the market shares of the participating firms on the market. However, it is essential to bear in mind that this definition by percentages, is, by itself, merely one of the series of elements necessary to evidence the holding of a dominant position; a percentage market share is not, as is commonly but erroneously believed, conclusive evidence thereof. There may well be special reasons why a high market share will not provide any degree of dominance, whilst vice versa it is not inconceivable that a low percentage market share could still be sufficient to provide its holder with a great deal of market power.

In the European Sugar Industry Decision<sup>23</sup>, the Commission presumed market dominance with market shares of 85% and 90-95% respectively, and then brought into account other evidence as proof of the existence of this dominant position. High market share need not, as mentioned above, be conclusive as evidence of dominance if the enterprise is exposed to the active competition of one or more other undertakings of equal strength and/or aggressiveness<sup>24</sup>. Alternatively a low market share might be consistent with dominance

if the remaining part of the market were fragmented amongst a large number of very small weak firms. In its BP Decision<sup>25</sup>, the Commission presumed market dominance with a market share which was reckoned, at most, to amount to 8% of the relevant market.

The paramount question in this analysis of market power will be the investigation of the degree to which the investigated firm is exposed to real and effective competition on the market. In this investigation the supply from third countries must be included in addition to the supply originating in the country, or possibly the region, in which the investigated enterprise is situated.

Having established this test, however, it must be stated that it is necessary to determine whether potential competitors are restricted de facto or de jure from exercising any real competition on the relevant market e.g. because they are unable to compete on the same terms as the dominant firm as a result of, say, higher transport costs attributable to further distances. All theoretical competition must be excluded from the examination of dominance if it is not, in fact, practicably exercisable by the suppliers who are active on the same product market as the supplier being investigated.

ii. The Jurisprudence

Article 86, it will be recalled, prohibits 'any abuse by one or more undertakings of a dominant position'.

The interpretation of what constitutes a 'dominant position' is a difficult one. It is not delimited by the necessity of a finding of a particular degree of market power. The position need not be monopolistic for that would be a too narrow interpretation of the

notion and would not be sufficient to achieve the aims of Article 3(f) or Article 86. Market dominance is not an absolute concept capable of accurate a priori definition; each individual case must be examined and decided on its merits.

Market dominance is primarily the potential to influence business behaviour and exercise real and effective control or influence of market events. In its 9th General Report, the Commission mentioned that it considered price leadership in oligopoly to be an instance of dominance<sup>26</sup>.

In the Decision in Continental Can<sup>27</sup>, the Commission ruled that an undertaking possesses a dominant position if it is so large relatively that it is free to decide its own policy without regard to the reactions of its customers, suppliers or competitors:

"Undertakings are in a dominant position when they have the power to behave independently which puts them in a position to act without taking into account their competitors, purchasers, or suppliers. That is the position where, because of their share of the market or their market share combined with the availability of technical knowledge, raw materials, or capital, they have the power to determine prices or to control production or distribution for a significant part of the products in question. This power does not necessarily have to derive from an absolute domination permitting the undertakings which hold it to eliminate all will on the part of their economic partners but it is enough that they be strong enough as a whole to ensure to those undertakings an overall independence of behaviour even if there are differences in intensity in their influence on the different partial markets".

In the United Brands Decision<sup>28</sup>, the Commission further delimited this definition:

"Undertakings are in a dominant position when they have the power to behave independently without taking into account to any substantial extent their competitors, purchasers and suppliers. Such is the case where an undertaking's market share, either in itself or combined with its know-how, access to raw materials, capital or other major advantage such as trademark ownership, enables it to determine the prices or to control the production or distribution of a significant part of the relevant goods. It is not necessary for the undertaking to have total dominance such as would deprive all other market

participants of their commercial freedom, as long as it is strong enough in general terms to devise its own strategy as it wishes even if there are difference in the extent to which it dominates individual sub-markets."

In the view of the Court of Justice, a firm finds itself in a dominant position "if it is in the position to restrict real competition on the market for the products or services in question"<sup>29</sup>. It suffices that an enterprise has a dominant position on the market for a raw material essential for the production of another product, even if it does not possess a dominant position on the market for that latter product, or that latter product could be interchanged with other similar products. The market for a raw material necessary for the production of another product can be distinguished from the market for the product<sup>30</sup>.

An enterprise which is active on a number of separate product or geographical markets may possess a dominant position on only one, or on only a few, of these markets in certain circumstances<sup>31</sup>. However, as it will be shown below, the fact that an undertaking is the holder of a dominant position on one market will tend to lead to a presumption of dominance on another market and may very well lead thereto<sup>32</sup>.

The possession of a dominant position may, according to the jurisprudence of the Court, rely on the fact that the enterprise in question is the holder of an existing protected right, such as patent or trademark. The European Court has repeatedly stated that the competition rules of the Treaty cannot disturb the existing protected rights of Article 36 and Article 222.

The Court has stated that neither the holder of a trademark<sup>33</sup>, the holder of a patent<sup>34</sup>, nor the holder of any other protected right<sup>35</sup> abuses a dominant position by the mere possession of such right. Nevertheless, the exercise of any one of these rights can in

certain circumstances violate the competition rules of the Treaty.

"Although a patent confers on its holder a special protection within the framework of a State, it does not follow that the exercise of the rights so conferred implies the existence of the three elements mentioned [in Article 86]. It could only do so if the utilisation of the patent could degenerate into an improper exploitation of that protection."<sup>36</sup>

Mention should be made at this point of the so-called 'deep pocket' theory in relation to market dominance. Both the Commission and the Court have stated that, in deciding upon the degree of market dominance possessed by a particular firm, regard should be had to the size of the undertaking overall, or of a group of which it is a member, in addition to the share of the particular market which is held by the firm being considered. It is thought that the fact that a company has access to large amounts of money, know-how or other similar advantage, makes it more likely that that firm will be able to exert a degree of influence over events on the relevant market, or events on other markets as well as the relevant market, which might not be possible if it were not for these extra resources.

It is conceivable, although unlikely in practice, that a financially strong enterprise might systematically undercut its rivals on a particular market over a long period of time in order to displace those rivals from the market. This long term undercutting, or predatory pricing policy, might be dependant on profits made by the enterprise on other markets being used to cross-subsidise the product, the market for which is subjected to severe competition. During the period of this type of exclusionary practice, there is likely to be very strong price competition. Nevertheless, the enterprise with the 'deep pocket' may find itself in a position which enables it to evade the desired market-regulatory effect of competition by the execution of exclusionary practices carried through because of its financial background or potential.

It should be mentioned in passing, that the de minimis provisions of the Commission Notice of 29th December, 1977<sup>37</sup> are not relevant in this situation, as, per definitionem, a firm which has a dominant position cannot benefit from a de minimis type exemption.

2) Oligopoly<sup>38</sup>

i. General Observations

The primary consideration for a finding of an oligopolistic dominant position, is that oligopolistic structure, per definitionem implies a market share for each participant less than that which would be necessary to substantiate a finding of market domination, in a monopoly type situation.

Each member of the oligopolistic industry would have to have taken part in the exercise of the dominant position power, which is possessed by the group as a whole. Collective Dominant Position is simply the position of power held jointly by the members of an oligopoly<sup>39</sup>. There must be shown to be such a singleness of behaviour by the oligopolists as is necessary to indicate the existence of a single business policy.

To establish such a unity of policy, it would be necessary to prove that the oligopolists behave consciously as a group; parallelism of behaviour could be sufficient to evidence such unity, provided that such parallelism is not unconscious parallelism. It could be argued that, in addition to the evidencing of the conduct of the oligopolists, it would be necessary that the oligopolists, as a group, realise some form of monopolistic performance on the market.

It is likely that at least one oligopolist in the industry - usually the price leader - will have power sufficient to found an analysis of individual market dominance. This market power becomes transformed into an abuse of a dominant position, within the meaning of the Treaty rules, the moment when the exercise of this power starts to limit the individual opportunities of the other enterprises on the market. For a finding of collective market dominance, it is sufficient that the enterprises together possess a dominant position, it is not necessary that the enterprises in the oligopoly exploit this position together.

ii. The Jurisprudence

Article 86 prohibits 'the abuse by one or more undertakings of a dominant position . . . .' From this quotation it is clear that the provisions of the Article are such as to cover the situation of multi-enterprise domination of the type discussed above as collective market domination.

The Commission has not, however, taken a Decision on this point, and the Court has not been called upon to give its views on the scope of this provision. This does of course, exclude those decisions and judgments relating to oligopoly which have also involved some form of restrictive agreement of the type prohibited by Article 85 (1).

The only indication of Commission thinking on this matter comes from the Oil Report of the Commission<sup>40</sup>, where the Commission found that, during the Oil Crisis, the market position of the large integrated oil companies (those with their own refining facilities) was re-inforced by the relative scarcity of supply and even more so by the fear of real scarcity - even if such real scarcity never transpired in practice. The situation caused concern that there

were real risks of anti-competitive practices - notably market sharing, abusive policies and the elimination of less well-placed market competitors and independent dealers.

Once the shortage materialised, the supply of oil-based products was affected not only by this shortage of supply but also by the attitudes of the governments of the various Member States, notably the Netherlands, towards this threat. The Member States tended to pursue independent short term policies which involved the oil companies or their representative trade associations in the implementations of national energy policy objectives. This involvement necessarily led to some degree of concertation between the oil majors which, although done with the blessing and approval of national authorities, could not avoid having some effect on the free play of competition on the relevant market and so ran the risk of falling within the rules of the Treaty on competition.

The Commission considered that the supply position was not radically different during the crisis from that which had previously existed but, bearing in mind the apparent scarcity of oil related products - insofar as the oil majors had at their disposal, transported and refined the bulk of all crude oil produced - the position of the independents, and some of the less powerful integrated companies, was seriously prejudiced.

Nevertheless, at the same time, the position of the companies with their own refining capacity was strengthened to such an extent that they, as a collective group, acquired a collective dominant position on the market.

From the point of view of the commentator seeking to clarify the jurisprudential approach to the problem of collective market

dominance, it is to be regretted that the Commission did not feel able, in the sole Decision which it adopted on the basis of the Oil Report, the BP/ABG Decision<sup>41</sup>, to base its findings on the concept of collective dominance.

In the absence of any Decision or judgment dealing with oligopolistic dominance, the problem must to a certain degree remain theoretical, but it appears reasonably clear that the provisions of Article 86 would be equally applicable to oligopolistic groups as to single enterprises. The question of whether Article 86 is applicable alone to this situation or whether it should be used in conjunction with Article 85 (1) will be discussed in the section of this Chapter dealing with abuse of a dominant position in oligopoly.

b. Abuse of a Dominant Position

1) Monopoly

i. General Observations

The question of whether a particular type of behaviour is 'abusive' will, to a great extent, depend on the particular fact situation of the market being investigated. Whilst not all abuses can be grouped within a general formula, it is the task of the supervisory authorities, who have to ensure that enterprises which possess a dominant position are not able to abuse that position, to attempt to indicate that type, or those types, of behaviour which they anticipate will be found to be abusive in most cases.

These indications cannot, by their very nature, be exhaustive but, despite the relatively few Decisions taken under Article 86 (and the high proportion thereof subsequently annulled by the Court), there can be seen a number of practices which have been clearly shown to be abusive.

The mere possession of a dominant position cannot constitute an abuse; the dominant firm must, through its possession of a dominant position, be in a position to gain some form of advantage over other enterprises on the market, which it could not have gained had there been effective competition. Further, that advantage, and the exploitation thereof, must have led to some unjustifiable disadvantage for third parties. Without some disadvantage accruing to other firms on the market, or, more particularly to consumers on the market, it is unlikely that a finding of abuse can be upheld.

It has been stated that all behaviour, which is open to the dominant firm solely because of its power base, will be abusive insofar as it affects third parties in the exercise of their economic or commercial freedom of action in a way which would be impossible if effective competition existed.

This seems to be an accurate test of the existence, or possible existence of abuse.

ii. The Jurisprudence

Article 86 provides that :-

"Any abuse by one or more undertakings of a dominant position within the common market or a substantial part of it shall be prohibited as incompatible with the common market insofar as it may affect trade between Member States. Such abuse may, in particular consist in :

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- (b) limiting production, markets or technical development to the prejudice of consumers;
- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature, or according to commercial usage have no connection with the subjects of such contracts".

The Court of Justice has ruled that the situation envisaged in Article 86 consists of three separate elements<sup>42</sup>, the existence of a dominant position; its abuse; and the possibility that such abuse may affect trade between Member States. The first and third of these elements have been discussed above and the second will be analysed here.

The existence of a dominant position per se is not prohibited by the Treaty rules - only such part of that dominance which offends against the regime of Article 86 if the firm has achieved its dominance as the result of internal growth as opposed to market behaviour. This corresponds to the monopolization approach of the US antitrust policy, outlined in Section 2 of the Sherman Act.

As Judge Leahy stated in the Cellophane Case<sup>43</sup>:

"A position achieved by 'superior skill, foresight or industry', or one resulting from 'a new discovery of an original entry into a new field' cannot be achieved through circumstances beyond the defendant's control. Intense research activity, market development and expansion of production capacity were a necessary part of du Pont's development of cellophane. The Sherman Act was not intended to discourage these things . . . "

The Commission, also recognises the need for firms in the Community to adapt to the larger market dimensions and encourages large enterprises mergers.

There is no absolute definition of abuse either in the Treaty or in the jurisprudence of the Commission or the Court. Article 86 (a) - (d) are merely illustrative of those types of business behaviour which the Treaty founders, and necessarily also the Commission, considered would, in general, be such as to be termed as 'abusive'. None the less, it is thought that any extension of this list to other forms of business conduct would have to be extended to those forms of behaviour which are iusdem generis with

those examples.

The confines of this study do not make it possible to go into the various abuses which the Commission and the Court have found to exist in detail. However, some mention will be made of some of these to enable the reader to perceive the type of conduct which is likely to be struck at.

The Group of Professors appointed by the Commission has defined abuse of a dominant position as 'the actual exercise of market domination to obtain advantages which would have been impossible in the face of effective competition'<sup>44</sup>.

In its various Decisions, the Commission has perceived as abuses the discrimination against nationals of other Member States (this would also be contrary to Article 7), the imposition of unnecessarily restrictive obligations on members of a Performing Rights Society<sup>45</sup>, and the imposition of unfair conditions on suppliers by a purchaser with a near monopoly position on the market<sup>46</sup>. Refusal to supply has, in certain Decisions been seen as an abuse but this question will be dealt with later<sup>47</sup>.

Unfair pricing policy has been condemned by the Commission<sup>48</sup>, but equally the Commission approach to this problem has been criticised by the Court<sup>49</sup>. Restrictions on imports and on exports have been condemned, as has the practice of granting fidelity rebates and the use of the so-called 'English Clause'<sup>50</sup>.

Practices often utilising protected rights such as patents or trademarks have been struck at where these practices are used to partition the market or support differential pricing structures<sup>51</sup>.

The question of whether Article 86 can be used in merger situations is unclear. In the Continental Can Case the Commission considered that in the circumstances, the merger by Continental

Can's European subsidiary constituted an abuse of a dominant position. This approach has been much criticised and it had been thought that, following the publication of a draft Regulation <sup>53</sup>, on the control of concentrations, this road was no longer being followed. However in the United Brands Case <sup>54</sup>, the Advocate General (Mayras) stated that 'to accept as a justification for this refusal that the ripener in question was said to have participated in an advertising campaign to promote the bananas which it was selling under a competing brand name, would mean that the undertaking would be entitled to enlarge the dominant position which it enjoyed, and consequently to abuse it'. Is this a Continental Can approach in disguise? The Advocate General appears to be saying that the mere enlargement of a dominant position can thereby be an abuse thereof. If this is the case, and the Court does not comment on this point in its judgment, it is a radical departure from the previously understood state of affairs.

Notwithstanding the absolute prohibition of Article 86 the rules of the Treaty do not, and indeed cannot, have any degree of moral, ethical or criminal guilt. The only sanctions which the Commission can impose are administrative and the fines which it can impose are administrative penalties and not criminal sanctions.

Finally it should be noted that Article 86 unlike corresponding provisions in the US, <sup>54a</sup> British and <sup>54b</sup> German <sup>54c</sup> legislation does not require any decision, judgment or finding by any Court, tribunal or administrative authority to have been made before the sanction of a fine can be imposed; under Article 86 the abuse of a dominant position is directly prohibited by law.

## 2. OLIGOPOLY

### i. General Observations

Abuse of a dominant position in a situation of oligopoly (abuse of a collective dominant position) is merely the situation where there is an abusive exploitation of the position of power held by members of an oligopolistic group. It is not necessary that every, or even a number of enterprises in the group abuse the perceived dominant position, but merely that at least one of them does so. The question of whether there exists a sufficient degree of competition between the participants in the oligopolistic group is also irrelevant for this study - it is the overall effect towards third parties which must be considered. That is not to say of course, that the relationship of the oligopolists inter se is not to be considered; their relationship may be important in determining whether there has been any infringement of any other Treaty rule, in particular the provisions of Article 85 (1).

For the purposes of this Section, it is assumed that any parallelism of behaviour between the oligopolists is the result of a common reaction to an identically perceived problem facing the members of the group. This parallelism, whether conscious or unconscious may be considered as an abuse in certain circumstances (although where the parallelism is 'pure' - i.e., not depending upon any agreement, tacit or express, - or more particularly, unconscious - i.e., not being more than a coincidence - it is doubted whether any abuse within the meaning of the Treaty framework could exist). The situation where the parallelism results from an agreement or understanding would fall under the provisions of Article 85 (1) and be dealt with accordingly.

The economic and legal implications of a long-term existence of price parallelism, and the methods whereby such a parallelism can be achieved and maintained, have been discussed elsewhere and it suffices here to say that it is possible and in the case of certain types of parallelism and the price leadership associated therewith probable, that such a commonity of behaviour will be an abuse, as that term is understood.

Certain types of behaviour have been regularly criticised by the various control authorities who have had to consider the problem of abusive behaviour in oligopoly<sup>55</sup>. Advertising expenditure, in particular, has caused the authorities a great deal of concern.

The problem seems to be that the uniform market behaviour of the members of the oligopolistic group, while of such a nature as to cause a certain degree of anxiety cannot be seen as other than the normal state of affairs in oligopoly. Should firms be condemned for acting in a normal and rational way? Certainly where the uniformity is based upon a type of concerted practice prohibited by the restrictive practices legislation action should be taken, but in those circumstances, the provisions of Article 86 would be superfluous.

From this last mentioned point another often made suggestion arises; should only Article 86 be applied to oligopolists or does Article 85(1) also have a role to play? The jurisprudence of the Communities, insofar as it has dealt with oligopolists seems to tend to the view that Article 85(1) is to play the primary role and Article 86 is a back-up provision to be used to supplement Article 85(1) where appropriate<sup>56</sup>, or to be used where there is no form of

agreement etc., of the type envisaged by Article 85(1). This does not mean that, in particular circumstances, Article 86 could not have a primary function; indeed in a situation of pure parallelism, there could be no place for any other Article in the control.

ii. The Jurisprudence

The problem with any discussion of the role and position of the Communities' rules on competition as applied to oligopoly is that there is no Decision or judgment dealing with the problem, where the assessment has not been founded upon a restrictive agreement. The provisions of Article 86 allow the Commission to deal with the non-collusive, but anti-competitive behaviour of the firms in the oligopolistic group, whether this behaviour be exclusionary conduct or some other type of action resulting in an arrangement of market conditions.

Taking into consideration the view of the Court in the Sugar Case as regards concerted behaviour<sup>57</sup>, it is quite conceivable that, should it so desire, the Commission could draw parallelism of conduct within the parameters of 'concerted practice'. The Author would argue however, that this interpretation would go beyond what the Treaty founders intended; it is contended that only Article 86 has a role to play in the absence of some form of restrictive arrangement.

If one accepts that Article 86 is concerned only with action on the market and is neutral towards the structure of the market as existing (and this ignores the judgment in Continental Can and the Opinion of the Advocate General, discussed above) then it is difficult to accept that the very fact that an oligopoly exists - and

consequently that competitive conditions on the market have been cemented - can be an abuse of a dominant position within the meaning of Article 86.

There is the problem with oligopoly in knowing how far the behaviour of the individual oligopolists can approximate to that of the other firms in the industry without running the risk of being accused of engaging in concerted practices or, subject to the limitations and comments made above, abusing their collective dominant position. It seems to be accepted, that failing any restrictive arrangement, no finding of concerted practice or abuse will be made, provided that the firm in question is, in its action, merely adapting its business policy and methods to the requirements of the market and, in particular, to the changes in that market occasioned by the behaviour or anticipated behaviour of its competitors. This does of course assume that there is no exchange of information between the parties either directly or through an intermediate third party.

In the absence of any formal case dealing with the oligopolistic abuse question, the major indication of the Commission's view on the subject is to be found in the Oil Report of 1975<sup>59</sup>. The Report raised a number of questions but, overall, no abuse was found to have taken place; nor was any infringement of Article 85(1) discovered in relation to the supply of crude oil to the Community. The Report discussed the changes which had taken place in the oil market as a result of the oil shortage and, more particularly the fear of more acute shortage in the future. As a result of this supply crisis the oil companies necessarily changed their relation-

ships vis-a-vis those who purchased oil products from them; a number of small firms were absorbed by the oil majors; other buyers concluded long-term supply contracts with the oil companies, thus depriving themselves of genuinely free access to the market. Nevertheless, the Commission was unable to discover any occasion on which the oil refiners had abused the collective dominant position which had been thrust upon them collectively as a result of the oil shortage.

However, the Report stated that, arising out of their investigations, a number of cases of presumed abuse of an individual dominant position by certain companies in respect of individual dealers who were their customers were being considered. From this statement followed the Commission Decision in the BP/ABG Case<sup>60</sup>. This Decision which dealt with an alleged abuse consisting of a refusal to supply will be considered in more detail at a later point in this study<sup>61</sup>. It was, in any case, subsequently annulled by the Court for failure to establish that there had, in fact, been any abuse of a dominant position (or per the Advocate General, whether there was even a dominant position)<sup>62</sup>.

As far as the Community is concerned it appears clear that the Treaty rules of Articles 85 and 86 provide the Commission with the necessary powers and authority to take action against any perceived abuse of a collective dominance. Whether they will choose to do so is another matter entirely; it will often be easier to take a Decision on the basis of an infringement of Article 85(1) or abuse of an individual dominant position under Article 86. The timing of any Decision on abuse of a collective dominant position

will to a certain degree, be a political as well as a competition one. The extension or application of the rules to this field is one which has never been seriously attempted in any of the Member States, although the United States has made tentative steps in that direction, and it may be that the Commission is awaiting a lead from one of the Member States before embarking on this new venture.

c. Common Market or a Substantial Part of it

Article 86 provides that the abuse with which that Article is concerned is that of a dominant position in the common market or a substantial part of it, (and there can be no contravention of the Treaty rules if the dominant firm abuses its position, provided that the position does not extend to a substantial part of the common market). It is therefore necessary to examine what is meant by the phrase 'a substantial part of it'. Whilst it is relatively simple to decide whether the dominant position is held over the whole common market, what constitutes a substantial part is open to dispute.

The problem, is basically to determine the relevant geographical market. This point has been extensively discussed elsewhere<sup>63</sup>, (as has the question of the relevant product or temporal market), but it can be said here that it will be a question of fact whether the area, over which the dominant position extends where this is less than the whole common market, is important enough to be considered 'substantial'.

Each Member State falls within this definition. It is probable that so also would each of the countries making up the United Kingdom (with the possible exception of Northern Ireland), each of

the German Lander, and the larger French administrative regions. It is only when the area being considered is less than these examples that a problem will arise; the dominant firm will necessarily argue that the area over which it has market power, is an area which is not substantial as that phrase is intended by Article 86.

It is for the control authority, (in this case the Commission) to decide whether the area is substantial. There appear to be no prima facie rules as to how they should approach this task, but it is considered that in addition to the actual geographical area covered, importance should be laid on the population residing in the area, on the level of economic development of the area, and on the type of product for which the dominant position is held<sup>64</sup>.

As a background which may contribute to a better understanding of the concept of 'refusal to supply', such basic concepts as 'undertaking', 'trade between Member States', 'dominant position', 'market dominance', 'monopoly', 'abuse of a dominant position', and 'oligopoly' have been considered in the preceding sections of this Chapter from the standpoint of a legal interpretation and definition. The terms 'undertaking' and 'trade between Member States' may be qualified as being of contextual significance only, providing us as they do, with no significant contribution towards a direct legal clarification of the content and limit of 'refusal to supply' as a legal concept, although they assist in completing the framework within which the topic of this thesis is to be considered.

'Dominant position', 'market dominance', 'monopoly' and 'oligopoly' relate more directly to 'refusal to supply' in that they qualify as 'dominant' or as enjoying a position of 'monopoly' undertakings or firms capable of exercising their will or discretion, in economic terms, to supply or not to supply. It is through

this medium that we approach a formal economic definition of the market power or capability of undertakings or firms which may decide to supply or not to supply. However, an analysis of the text of Articles 85 and, more particularly, Article 86, and the judicial interpretation thereof shows that these Articles, and the legal concepts to which they refer, cannot be interpreted or applied satisfactory in isolation from the economic or market context in which they are to play their role of regulating, controlling and influencing the firms in question from a competition standpoint.

In this respect, reference is made to the observations of Chapter 5 that whilst competition law relies for its interpretation and application on the economic or market environment or system within which it is expected to operate, the definition of the relevant economic or market environment or system depends ultimately on the policy, policies or intentions as to the direction which the given market is expected or influenced to take.

It is perhaps significant in this respect that, whilst in the legal sphere reference is made to 'EEC competition law' or 'Community competition rules' etc., the most directly relevant provisions - Articles 85 and 86 - are to be found in Part Three of the EEC Treaty under the heading 'Policy of the Community', and not under a heading with specific reference to competition law. This makes it clear that the competition law is to be considered in an economic as well as a legal context. It is only through the economic context that the theory of law is linked to the realities of the market or economic system in which that theory is to operate whilst, for legal purposes, competition in economic terms only would not be of use in determining legal or illegal conduct and the respective legal consequences attached thereto.

Returning then to the present Chapter within the framework of the thesis as a whole, we are unable as yet to give any firm legal definition of 'refusal to supply' as the determination of a refusal to supply as being lawful business conduct or as constituting an abuse of a dominant position will depend on the general definition of 'abuse' within the meaning of Article 86 of the Treaty. As has been stated above (Section II (b) (1)(ii)) "there is no absolute definition of abuse either in the Treaty or in the jurisprudence of the Commission or the Court."

In our endeavour to clarify the concept of 'refusal to supply' to the extent that this can be undertaken in a relevant economic and legal analytical approach, Chapter 3, will briefly survey the important economic or market factors which affect the mutual interaction of demand and supply. This is intended as an assessment of the extent to which the economic context of the topic can contribute to a better understanding of 'refusal to supply' as a legal concept, before this concept is dealt with analytically in Chapter 4 in the light of jurisprudential practice.

FOOTNOTES TO CHAPTER TWO

1. Decision of 2nd June, 1971, on a proceeding under Article 86 of the Treaty GEMA J.O. No. 134, 20th June, 1971, p.15; (1971) CMLR D 35; CM/M/I/37.
2. Decision in GEMA, cited at Note 1.
3. Decision of 2nd January, 1973, on a proceeding under Article 85 and 86 of the Treaty European Sugar Industry O.J. No. L 140, 26th May 1973, p.17; (1973) CMLR D65; CM/M/I/67.  
  
Judgment of the Court of 16th December, 1975 - Suiker Unie a.o. -v- EEC Commission - Cases 40-48/73, 50/73, 54-56/73, 111/73, 113-114/73; (1975) ECR 1663; (1976) 1 CMLR 295; CM/M/III/53.
4. Preliminary ruling of the Court of 8th June, 1971 - Deutsche Grammophon GmbH -v- Metro-SB-Grossmarkte GmbH KG - Case 78/70; (1971) ECR 487, (1971) CMLR 656; CM/M/III/22.
5. Preliminary ruling of the Court of 27th March, 1974 - BRT -v- SABAM and NV Fonior - Case 127/73; (1974) ECR 313; (1974) CMLR 238; CM/M/III/39.
6. Decision of 30th June, 1970, on an application for negative clearance under Article 2 of Regulation 17 Kodak J.O. No. L 147, 7th July, p.24; (1970) CMLR D19; CM/M/I/29.  
  
Decision of 17th December, 1975, on a proceeding under Article 86 of the Treaty United Brands Co. O.J. No. L95, 9th April, 1976, p.1; (1976) 1 CMLR D 28; CM/M/I/100.
7. Decision of 23rd December, 1977 on a proceeding under Article 95 of the Treaty BMW Belgium NV and Belgian BMW Dealers O.J. No. L 46, 17th February, 1978, p. 33; (1978) 2 CMLR 126; CM/M/I/125.
8. U.S. Sherman Act 1890, Ss. 1 and 2; USA/L/I/1.

9. Preliminary ruling of the Court of 30th July, 1966, -  
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ECR 235; (1966) CMLR 357; CM/M/III/4.
10. Judgment of the Court of 13th July, 1966 - Etablissemments  
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11. Decision of 22nd December, 1972, on a proceeding under Article  
85 of the Treaty CIMBEL J.O. No L 303, 31st December, 1972, p.  
24; 1974 CMLR D 167; CM/M/I/64.
12. Decision of 29th December, 1970, on a proceeding under Article  
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p. 15; (1971) CMLR D6; CM/M/I/34.
13. Decision of 20th October, 1972, on a proceeding under Article  
85 of the Treaty Central Heating J.O. No L 264 23rd November,  
1972, p.22; (1972) CMLR D 130; CM/M/I/60.
14. Judgment of the Court of 17th October, 1972 - Vereeniging van  
Cementhandelaren -v- E E C Commission - Case 8/72; (1972) ECR  
977; (1973) CMLR 7; CM/M/III/36.
15. Judgment of the Court of 20th November, 1975 - Papiers Peints  
-v- E C COMMISSION - Case 73/74; (1975) ECR 1491; (1976) 1 CMLR  
589; CM/M/III/52.
16. Decision of 23rd July 1974, on a proceeding under Article 85 of  
the Treaty Papiers Peints de Belgique O.J. No L 327, 29th  
August, 1974, p.3; (1974) CMLR D 127; CM/M/I/76.
17. Decision of 8th December, 1977, on a proceeding under Article  
86 of the Treaty, Hugin-Liptons O.J. No L 22, 25th January,  
1978 p.23; (1978) 1 CMLR D 19; CM/M/I/120.

18. Judgment of the Court of 31st May, 1979 - Hugin Kassaregister AB -v- Commission - Case 22/78; (1979) ECR 1869; (1979) 3 CMLR 345; CM/M/III/78.
19. Preliminary ruling of the Court of 9th July 1969 - Franz Volk -v- Etablissements J Vervaecke - Case 5/69; (1969) ECR 269; (1969) CMLR 273; CM/M/III/11.
20. Preliminary ruling of the Court of 25th November, 1971, Beguelin Import Co -v- Import Export SA - Case 22/71; (1971) ECR 949; (1972) CMLR 81; CM/M/III/26.
21. Commission Notice of 27th May 1970 concerning agreements, decisions and concerted practices of minor importance which do not fall under Article 85 (1) of the Treaty establishing the European Economic Community; J.O. No C 64, 2nd June, 1970, p.1.; CM/L/III/3.
22. Commission Notice of 19th December 1977 concerning agreements of minor importance which do not fall under Article 85 (1) of the Treaty establishing the European Economic Community; O.J. No C 313, 29th December, 1977, p. 34; CM/L/III/3.
23. Decision in European Sugar Industry cited at Note 3.
24. Decision of 26th July, 1972 on a proceeding under Article 85 of the Treaty Fine Paper J.O. No L 182, 10th August 1972, p. 24; (1972) CMLR D 94; CM/M/I/57.
25. Decision of 19th April, 1977 on a proceeding under Article 86 of the Treaty BP/ABG O.J. No L 117, 9th May, 1977; (1977) 2 CMLR D1; CM/M/I/112.
26. See also Decision of 9th June, 1976 on a proceeding under Article 86 of the Treaty Vitamins O.J. No L 223, 16th August, p. 27; (1976) 2 CMLR D25; CM/M/I/103.

27. Decision of 9th December, 1971, on a proceeding under Article 86 of the Treaty Continental Can J.O. No L 7, 8th January, 1972 p.25; (1972) CMLR D11; CM/M/I/43.
28. Decision in United Brands Co cited at Note 6.
29. Judgment in Deutsche Grammophon GmbH -v- Metro-SB-Grossmarkte GmbH KG cited at Note 4.
30. Judgment of the Court of 6th March, 1974, - Instituto Chemio-terapico Italiano SpA and Commercial Solvents Corporation -v- EEC Commission - Cases 6-7/73; (1974) ECR 223; (1974) CMLR 309; CM/M/III/40.
31. Decision in Vitamins, cited at Note 26.
32. Decision in Vitamins, cited at Note 26.
33. Preliminary ruling of the Court on 18th February, 1971 - Sirena -v- Eda - Case 40/70; (1971) ECR 69; (1971) CMLR 260; CM/M/III/20.
34. Preliminary ruling of the Court of 29th February, 1968 - Parke-Davis & Co -v- Probel, Reese, Beintema-Interpharm and Centrpharm - Case 24/67; (1968) ECR 55; (1968) CMLR 47; CM/M/III/9.
35. Judgment in Deutsche Grammophon GmbH -v- Metro-SB-Grossmarkte GmbH KG cited at Note 4.
36. Judgment in Parke-Davis & Co., -v- Probel, Reese, Beintema Interpharm and Centrpharm cited at Note 34.
37. De minimis Notice, cited at Note 22.
38. Flint : Abuse of a Collective Dominant Position, Legal Issues of European Integration; 1978/2, p. 21.
39. See Judgment of 13th February, 1979 - Hoffmann-La Roche -v- Commission - Case 85/76; (1979) ECR 461; (1979) 3 CMLR 211; CM/M/III/77.

40. Report by the Commission on the behaviour of the Oil Companies in the Community during the period from October, 1973, to March 1974: Brussels, December, 1975.
41. Decision in BP/ABG cited at Note 25.
42. Judgment in Sirena -v- Eda cited at Note 33.
43. US -v- EI du Pont de Nemours & Co., 351 US 377 (1956).
44. Commission Memorandum on Concentration 1st December, 1965, p. 24.,
45. Decision in GEMA cited at Note 1.
46. Press Release in Eurofima of 16th April, 1973, IP (73) 67; CM/M/II/39.
47. See Chapter Four.
48. Decision in United Brands Co., cited at Note 6.
49. Judgment of the Court of 14th February 1978 - United Brands Co -v- Commission - Case 27/76; (1978) ECR 207; (1978) 1 CMLR 429; CM/M/III/71.
50. Decision in Vitamins, cited at Note 26.  
Judgment in Hoffmann-La Roche -v- Commission, cited at Note 39.
51. Judgment in Parke-Davis & Co -v- Probel, Reese, Beintema-Interpharm and Centrpharm, cited at Note 34.  
Judgment in Deutsche Grammophon GmbH -v- Metro-SB-Grossmarkte GmbH KG, cited at Note 4.
52. Judgment of the Court of 21st February, 1973, - Europemballage and Continental Can -v- Commission - Case 6/72; (1973) ECR 215; (1973) CMLR 219; CM/M/III/38.
53. Proposal for a Regulation (EEC) of the Council on the Control of Concentrations between undertakings O.J. No C 92, 31st October, 1973. p.1; CM/L/II/16.

54. Judgment in United Brands Co -v- Commission cited at Note 49.
- 54a. Sherman Act 1890, S2; USA/L/I/1.
- 54b. Fair Trading Act 1973; UK/L/I/1.
- 54c. Gesetz gegen Wettbewerbsbeschränkungen, 1974; GER/L/I/1.
55. See UK Monopolies Commission Reports on Breakfast Cereals, 1973, and Household Detergents, 1966.
56. Decision of 24th July 1969 on a proceeding under Article 85 of the Treaty Dyestuffs J.O. No L 195, 7th August 1969 p. 11; (1969) CMLR D 23; CM/M/I/26.
57. Decision in European Sugar Industry cited at Note 3.
58. Judgment in Europemballage and Continental Can -v- Commission cited at Note 52.
59. Commission Oil Report, cited at Note 40.
60. Decision in BP/ABG cited at Note 25.
61. Chapter Four.
62. Judgment of the Court of 29th June, 1978 - British Petroleum Maatschappij BV -v- Commission Case 77/77; (1978) ECR 1513; (1978) 3 CMLR 174; CM/M/III/75.
63. Flint : Op cit.
64. Judgment in Suiker Unie a.o. -v- Commission cited at Note 3.

CHAPTER THREE

BASIC ECONOMICS OF SUPPLY AND DEMAND IN THE E.E.C.

Although this study is concerned with the legal problems and rules relating to a refusal to supply in its widest sense, competition policy is not merely a legal doctrine, nor indeed is its main component element one of law; rather competition policy is a politico/socio/economic theory, whose main connection with the law is that the broad guidelines which those other disciplines impose must be capable of legal interpretation and application by the courts and the control authorities by reference to the legal rules implementing the guidelines.

It is therefore necessary to mention the basic economic framework on which the Treaty rules on competition are based<sup>1</sup>. The basic concepts of economics are those of supply and demand<sup>2</sup> and the competition policy is designed, inter alia, to ensure the free interplay of these concepts. In so far as refusal to supply is concerned, this will have an effect on this free interplay by preventing the supply of that which is demanded, so ensuring that the situation on the market is different from that which would otherwise have prevailed.

The principal facet of all economic systems is that of scarcity<sup>3</sup>; consumers have unlimited wants but economic resources (men, machines, materials and management) are limited. It is therefore necessary in all systems for decisions to be taken; what to produce, where to produce, how to produce, how much to produce, when to produce and how to distribute the production. How these decisions are taken will depend on the co-ordinating mechanism of the economic system involved. Insofar as the EEC is concerned the main co-ordinating mechanism is that of the market - if enough of a product is wanted and a price is offered, production will take place provided that the price is such that a profit can be made. The other main co-ordinating mechanism is that of command - a central overall

plan is determined for the nation in terms of quotas, and industrial and management plans are derived therefrom.

It is the co-ordinating mechanism that allocates scarce resources; market economy - by market forces of supply and demand; command economy - by government.

In all the Member States of the Community and in the Community itself the economic system is that of the mixed economy - albeit the mix between market and command economies varies from Member State to Member State. Such a mixed economy is characterised by five main factors:-

- (a) Basic private enterprise with state intervention in key sectors;
- (b) Government provisions of goods and services which are not of commercial but of a vital nature to the development of the economy, e.g., electricity.
- (c) Government can operate some industries more efficiently than can private enterprise e.g., Defence.
- (d) Consumer protection and worker protection.
- (e) Management of the economy (macro-economic management) to influence the levels of employment etc. This is obviously more readily achieved if the government itself controls large sectors of the economy through nationalised industries.

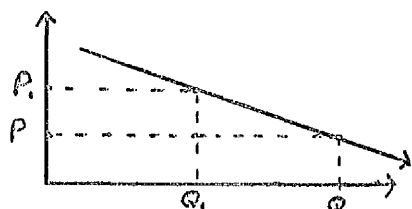
Although the EEC economy is mixed, it is the role of the market economy part with which the competition law is concerned primarily, and thus, emphasis will be placed on that segment.

The most important mechanism in the market economy is that of price, which is the means by which scarce resources are distributed<sup>4</sup>; price acts as a link between producers and consumers and equates the amount sellers wish to offer for sale and the amount

that buyers wish to purchase. Demand for a product is the desire to possess that product accompanied by the ability and willingness to pay for it. From this can be deduced two laws of demand:-

1. The higher the price - the less that will tend to be demanded;
2. The lower the price - the more that will tend to be demanded.

Whilst this is not true in all cases, it holds good for most items

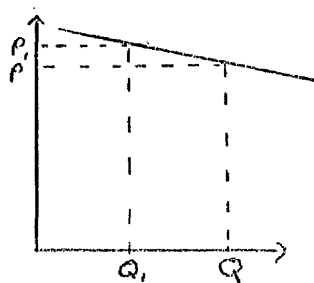


In the example shown<sup>5</sup>, as price increases from P to P<sub>1</sub>, the quantity demanded will fall from Q to Q<sub>1</sub>

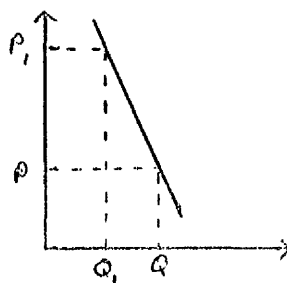
What is important is not the level of demand, but the change in demand which occurs as a result of the change in price<sup>6</sup>. From this can be calculated the price elasticity of demand, which is the way that demand responds to changes in price. The price elasticity of demand can be calculated by use of the formula:-

$$\frac{\text{The \% change in demand}}{\text{The \% change in price}} = X, \text{ where } X \text{ is the elasticity of demand.}$$

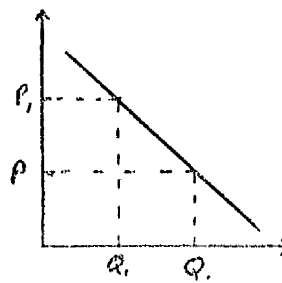
If X is greater than 1, demand is said to be elastic, i.e., that a certain percentage change in price will result in a larger percentage change in demand; if it is less than 1, demand is inelastic, i.e., a small change in demand will result; and if it is 1, then demand is said to have unit elasticity, i.e., a certain percentage change in price will result in the same percentage change in demand.



Elastic



Inelastic



Unitary

The tendency is for products having price elasticity to have a 'shallow' slope, whilst those which are inelastic have a "steep" curve.

Elasticity of demand is probably the most important factor for a producer; unless he knows whether or not demand for the product he is producing is price elastic, he will not know whether the result of a price increase will be to raise total sales income or to reduce it due to falling demand.

The elasticity will be affected by a number of factors<sup>7</sup> - the availability of substitutes; the degree of necessity; habit; value relative to income; credit facilities and terms therefor; frequency of purchase; fashion.

There exist types of elasticity of demand other than that of price elasticity; income elasticity of demand which indicates the way in which demand responds to changes in income; and cross elasticity of demand which shows the effect of changing the price of one product on demand for another. Thus if cars become 20% cheaper, there might be an increase in demand for petrol as more people found themselves able to buy a car. The same is true for products which are very close substitutes.

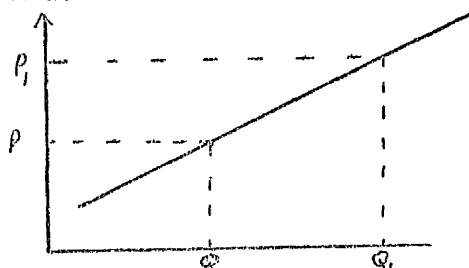
Having considered the behaviour of people in the economy relative to demand mention will now be made of the way suppliers behave.

Supply is the quantity of a commodity offered for sale per unit of time<sup>8</sup>. From this follow two laws of supply:-

1. As price rises more will tend to be supplied.

2. As price falls less will tend to be supplied.

These laws, whilst generally true, do not hold for some products such as land or works of art by dead artists, since supply is fixed.

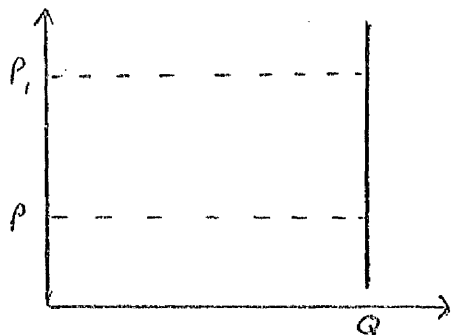


In the example shown, as price increases from  $P$  to  $P_1$ , the quantity supplied will rise from  $Q$  to  $Q_1$ .

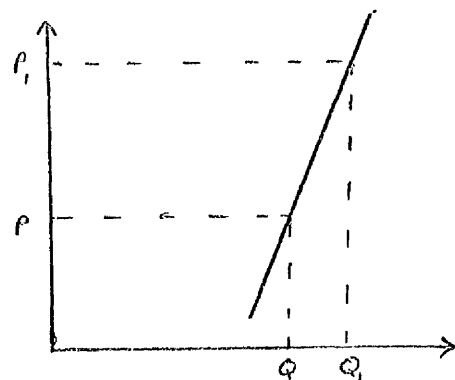
As with demand, what is calculated is not the absolute amount of supply but the change therein which will result from a change in price. In this way the price elasticity of supply is calculated<sup>9</sup>.

$\frac{\text{The \% change in quantity supplied}}{\text{The \% change in price of the good}} = X$ , where  $X$  is the elasticity of supply.

However, unlike demand, it is not possible for supply to

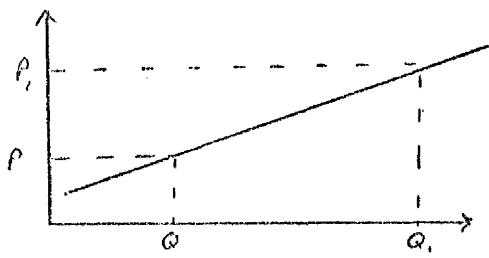


change immediately to meet increased demand. Thus in the very short term, no change in the quantity supplied will be possible at all - supply will be perfectly inelastic.



In the short term, when a slight increase in production is possible with existing production resources, worked more intensely, supply will still be very inelastic.

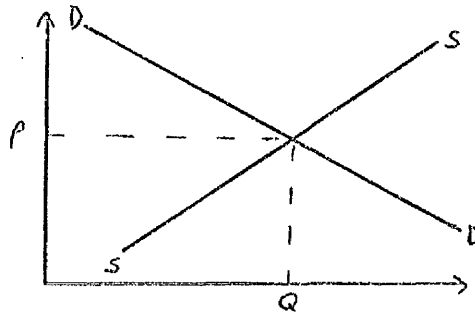
In the long term, when it is possible to adjust the



factors of production (employ more labour, use more machines etc.,) supply will be elastic.

In the Market economy, the level of supply and demand for any particular product will fluctuate until an equilibrium is reached at which the quantity demanded will equal the quantity supplied, assuming that there exists competition in the marketplace<sup>10</sup>. If a change in price occurs, the equilibrium will be lost and the demand and supply will fluctuate until either price is reduced and equilibrium restored or a new equilibrium is reached at the new price level, either because purchasers decide to pay more or suppliers being confronted with an excess of supply on the market cut back their production. It is for the competition law to promote the free attainment of this equilibrium.

Thus in the example opposite supply and demand are in perfect equilibrium at price  $P$  where quantity  $Q$  is both supplied and demanded.



The position is slightly different in the case of monopoly or of dominant positions on the market<sup>11</sup>. However, to have any appreciable degree of market power, the monopolist must control the supply of a product for which there are no close substitutes; there would be no benefit in being the sole producer of margarine, since consumers could buy butter, but if one supplier controlled the entire supply of salt this would be very significant since there is no substitute for salt.

Thus for the monopolist to have any significant power and discretion on the market, he must hold a monopoly in respect of products for which there is a low cross elasticity of demand -

irrespective of the increase in price, few consumers can or will change to substitute products. It is possible for price elasticity of demand to be low for a product as a whole, whilst the price elasticity of demand for individual suppliers is high. This is particularly true in the case of homogenous products such as bread.

However, it is rare in the market to find any firm having complete control of a product with completely inelastic demand, but monopoly control can be obtained without such power. Monopoly power in the sense of being able to influence and, in particular, to raise prices depends on some restriction on entry to the market by new firms.

If a monopolist is able to raise the price of a product and make above average profits - and continue to do so for a considerable time - there must be something that keeps other suppliers out of the market. As with perfect competition<sup>12</sup>, (a situation where there are so many firms that each must accept the price set by the forces of supply and demand, where each has no power over the market and each firm's ability to sell its product is uninfluenced by the behaviour of any other single firm), as profits rise more firms will be attracted to the market until all firms are making just sufficient profits to keep them in the industry. (normal profits) The monopolist can only make high abnormal profits if something prevents other suppliers from entering the market<sup>13</sup>.

There are many reasons why other potential suppliers are prevented from entering the market - not all of which give rise to proceedings under anti-trust legislation. The best example of this is superior business efficiency which drives competitors out of business - there is obviously no detrimental effect in attaining a

better position on the market by virtue of being better than one's competitors. There is also the case where a firm makes such a breakthrough in product development that it attains a dominant position on the market - the 'better mousetrap' situation or where the structure of the market requires such capital investment that would-be competitors are unable to enter the market at the same prices as the existing firms - eg., electricity, gas, water.

The monopolist can sometimes increase his profit by discriminating on price, by selling the same commodity in different markets at different prices. By obtaining the maximum return possible for each market, the monopolist is able to increase his total profits. To have any degree of success in this, the monopolist must be able to keep the two markets separate without too much difficulty; if he cannot keep the markets apart, enterprising consumers would buy cheap in one market to sell dear in another, so undercutting the monopolist in that latter market<sup>14</sup>.

It is this market separation, by the prevention of parallel imports, that the Community rules on competition and in particular Articles 85 and 86 are designed to prevent. It is an essential facet of the Treaty system that the EEC as a whole constitutes a single economic market and that there exists no division, whether by price differentials or by national regulation, which cannot be overcome by enterprising operators.

In this striving to prevent the transparency of the market being prejudiced, the dangers of cartels are equal to those of monopoly; in both cases, the natural course of the market is distorted by the deliberate actings of a party, or parties, on the market to the detriment of consumers as a whole.

The advantages of monopoly - economies of scale, stability,

less wastage of resources on unnecessary advertising - must be weighed against the potential dangers - excessive prices, stifling of research and innovation (although in a situation of perfect competition there would be neither research nor innovation) lack of variety for consumers, and the danger of the monopolist being able to exert political pressure to ensure the attainment of his aims.

It is within this general framework of economic theory that the aims of the EEC's competition policy must be seen. Although the exact aims of the policy have never been defined with precision, the aim of Article 2 (promotion of harmonious development of economic activities, continuous and balanced expansion, increase in stability, and an accelerated raising of the standard of living) and of Article 3 (f) (the institution of a system ensuring that competition in the common market is not distorted) provides us with a general framework in which the goals of the competition policy may be considered.

The first suggested goal is that of the diffusion of economic power and thereby, possibly, the protection of the freedom of the individual. It remains one of the basic tenets of a competition policy that each citizen should have equal opportunity and the application of the competition policy is seen as a means of achieving this aim. It does however, seem to imply a basic distrust of big business as such. In this aim, the conflict between economic logic and political expedience may be seen; it is patently obvious in a large number of situations that the most efficient utilisation of resources requires some degree of market concentration, but there exist advantages of a political or social nature in the retention of a dispersal of power amongst a large number of smaller enterprises.

The second suggested goal is that of the protection of the

participants of the market -- in the EEC context this appears specifically to refer to small and medium-sized enterprises. The aid is more the protection of competitors rather than the defence of the competitive process as such. It is in this context that the problem of refusal to sell, predatory pricing practices and boycott must be considered; all practices by which powerful firms might seek to endanger the existence of less strong competitors. This second goal may be seen as one of ensuring that 'fair' competition (as opposed to 'free' competition, which assumes a large degree of laissez faire) is protected; fair competition implies some form of control over the market behaviour of enterprises to ensure that their behaviour complies with the pre-determined behavioural norms.

There exist other possible goals of a competition policy, but they are more concerned with the technicalities of economic theory and will not be considered in detail here; suffice it to say that each system of competition law will have norms the attainment of which will be encouraged, and the violation of which will cause sanctions to ensue.

Whilst the traditional legal orders in Europe with regard to competition focussed upon substantive elements characterising economic behaviour - and prohibiting only those practices which were contrary to honest commercial conduct - the EEC approach is more concerned with the installation and safeguarding of certain objective market conditions. As the Commission stated in the First Competition Report in 1972<sup>15</sup>.

"Competition is the best stimulant of economic activity since it guarantees the widest possible freedom of action to all. An active competition policy makes it easier for the supply and demand structures continually to adjust to technological development. Through the interplay of decentralised decision-making machinery, competition enables enterprises

to improve their efficiency which is a sine qua non for a steady improvement in living standards. Such a policy encourages the best possible use of productive resources for the greatest possible benefit of the economy as a whole and for the benefit, in particular, of the consumer".

However, in the same Report, the Commission also states<sup>16</sup> that:

"competition policy must ensure fair competition so that enterprises...can be in general, benefit from the same conditions of competition".

This second aim is the reason why the Commission encourages certain forms of cooperation between small and medium-sized undertakings in order to penetrate foreign markets<sup>17</sup>, but it is an aim which can clearly be seen to be not always compatible with the first objective.

The first principle can be seen as encompassed within the general statement that the rules on competition were not adopted to give protection to individual competitors, but to maintain the competitive process. To a certain extent the two notions are not totally incompatible; a sufficient number of competitors is essential to ensure a sufficiency of competition. However, strong competition implies a continuous ebb and flow of entry to and withdrawal from the market since the creation and closure of undertakings is the basis of the market economy.

The second general principle can be seen as that of workable - as opposed to perfect - competition; to promote a process of rivalry under uncertain market conditions. Hence the Commission's attacks on open information agreements leading to a transparency of the market.

These two statements, taken together with the earlier suggestions of goals for the policy of the Community and the basic economic supply and demand theory give a framework against which the application of the Treaty rules on competition must be seen.

Competition policy is, after all, no more than the application of a

given set of predetermined performance indicators and economic tests to conduct on the market. Thus competition law is not 'law' in its purest sense, but rather the means by which the economic aims of the policy can be ensured and enforced.

For the subject of this study, refusal to supply, the danger is that the refusal may result in a permanent distortion of competition; if purchasers do not accept the terms offered by the seller immediately, supplies may be terminated. Where, as in the case postulated here, the supplier is in a dominant position, the result is that purchasers will be compelled to accept whatever terms are offered. This will necessarily lead to a lesser degree of price elasticity and probably also to higher price levels. In addition, there exists the real danger that the mere threat of a refusal to supply will be sufficient to enable the dominant firm to enforce other forms of anti-competitive behaviour having a noticeable effect on the nature of the market itself.

It is realised that this short discourse on the economic theory underlying the EEC system of competition law in its relevance to our topic is in no way an exhaustive study of the problem; nor is it meant to be. For the practitioner what is of most relevance is the way in which the rules are applied and the results of such application on the behaviour of the participants on a given market. However, it is not possible for him to deal with such problems adequately if he does not have some insight into the economic theory which underpins such application; it is for this reason that this Chapter has been included.

The general conclusion to be drawn from this Chapter is that, while an economic approach to the question of supply (and demand) is helpful in the better understanding of the interaction of supply

and demand with price as a nexus between them, in the light of the economic models taken as the basis thereof and not for the purpose of conclusions or predictions, an economic approach per se or prima facie does not answer the problem of which level of relationship or equilibrium would be the most desirable within a given market context or the context of economic development.

Once more we are faced with the problem of linking the economic and the legal approaches to 'refusal to supply' to the even more fundamental approach of policy. The link between these three approaches will be referred to in the conclusions in Chapter 5.

FOOTNOTES TO CHAPTER THREE

1. For background see B.T. Bayliss on Competition and Industrial Policy in the European Community in 'Economics of the European Community': A.M. El-Agraa, Ed., 1980 at pages 113 - 133. For economic theory see R.G. Lipsey, An Introduction to Positive Economics, 5th Edition, London, 1979; P.A. Samuelson, Economics, 11th Edition, 1980; R. Turney, Demand and Supply, 2nd Edition, London, 1980; Swann, The Economics of the Common Market, 3rd Edition, London 1975.
2. See Turney, op. cit. p. 13; Samuelson, op. cit. pp. 53, 55.
3. See Lipsey, op. cit. pp. 52 - 53.
4. See Lipsey, pp. 78 - 80; Samuelson, p. 53.
5. Diagrams by author.
6. See Lipsey, pp. 101 - 108; Samuelson, pp. 357 - 361, 373; Turney, pp. 20 - 21.
7. See Lipsey, pp. 109 - 110.
8. See Lipsey, pp. 88 - 91.
9. See Lipsey, pp. 112 - 113; Samuelson, pp. 362 - 364, 374; Turney, pp. 88 - 89.
10. See Lipsey, pp. 93 - 100; Samuelson, pp. 57 - 58.
11. See Lipsey, pp. 261 - 273; Samuelson, p. 39.
12. See Lipsey, pp. 243 - 260.
13. See Lipsey, p. 265; Turney, pp. 63 - 64.
14. See Lipsey, pp. 266 - 270.
15. At page 11.
16. At page 13.
17. See Notice of the Commission of 29th July 1968; J.O. No C75, 29 July 1968, p. 3; CM/L/III/3.

CHAPTER FOUR  
DISTRIBUTION AND SUPPLY  
UNDER ARTICLE 86

## A. METHODS OF DISTRIBUTION

This Section is concerned with the ways in which the application of distribution systems could be considered to be part of an abuse of dominant position within the context of Article 86. It should be noted that, in considering the total competition impact of such systems in the light of Article 86, regard also should be had to Article 85 (1) as, it is submitted, the two Articles form a two-pronged attack against anti-competitive behaviour.

Mention will be made of the effect on such systems of positions of dominance both in monopoly and in oligopoly, although there are fewer formal Decisions concerned with the latter. Regard will also be had to the conditions upon which supplies are made or offered. An outright refusal to supply, or a refusal to do business other than on terms which, taken as a whole, can be considered as amounting to nothing less than an implied refusal to supply, will not be considered in this Section but in a separate Section of this Chapter, *infra*.

### I. EXCLUSIVE DISTRIBUTION

The problem of exclusive distribution arrangements in light of Article 86 is a difficult one; such arrangements are, it will be recalled, specifically permitted in terms of Regulation 67/67 and, accordingly, need not be notified to the Commission in terms of Articles 4 and 5 of Regulation 17/62. Thus, if such an arrangement does not fall under Article 86, it can only be examined if a specific complaint is made to the Commission, or brought before the Court, or if the Commission comes upon the arrangement as a by-product of one of its investigations.

Such was the position in the Sugar Decision in 1973<sup>1</sup>. In its Decision the Commission stated that :-

"RT had abused this dominant position [on the Belgian and Luxembourg sugar markets] by exercising economic pressure on the undertakings Export and Hottlet [who had traditionally dealt with the export of Belgian sugar] so as to oblige them only to resell the sugar which it supplied to certain consumers and for certain uses, and to reimpose these limitations on their customers".

In addition the Dutch producers SU and CSM had obliged Dutch sugar dealers not to sell quantities of sugar imported from France at prices lower than those of the Dutch producers; not to undertake any further imports of sugar into the Netherlands without the consent of the Dutch producers; and to sell to Dutch producers the amounts to be imported in bags of specified sizes. These abuses were seen as limiting the sources of supply of the Dutch dealers who wanted to import freely into the Netherlands and, in this way, limiting the sources of supply of their customers. The position of the German producer SZV was also considered and this is discussed in connection with Commercial Agency contracts, *infra*.

Although the RT and SU/CSM situations were not of exclusive distribution in the sense that no formal agreement between the parties existed to that effect, it is submitted that the *de facto* economic relationship between the parties was of such a nature. In Belgium Hottlet and Export were reliant on RT for their supplies and since RT held 85% of the market they were obliged to obtain their requirements from RT.

Hottlet and Export, were therefore obliged to deal exclusively in RT sugar or sugar over which RT had exercised an influence.

When Advocate-General Mayras issued his Opinion in the Sugar Case in June, 1975<sup>2</sup>, he stated that RT had granted Export and Hottlet the exclusive right to sell sugar in the Netherlands provided that they restricted their deliveries to those purchasers or consumers who were approved by Dutch producers. In A.G. Mayras' opinion, RT had a dominant position in a substantial part of the common market and had abused that position in forcing Belgian exporters through its great economic pressure to come to terms with its concerted practice with German and Dutch producers, which concerted practice fell within Article 85 (1).

The fact that RT had a virtual monopoly on the relevant market, made it inevitable that Belgian dealers would have to buy sugar from it or one of the refineries it controlled if their survival was to be assured. In addition, as a result of its relations with its counterparts in other Member States, RT was able to dispense with the use of dealers when disposing of a large part of its exports should it so wish. The dealers, therefore, had to give in to RT's demands.

In short RT was using its dominant position to support and reinforce a situation which was clearly prohibited in terms of Article 85 (1) of the Treaty; such behaviour must necessarily constitute an abuse of a dominant position in terms of Article 86. Indeed, it can be argued that such a use of market power would fall specifically under the practices mentioned in paragraphs 2 (a) and 2 (b) of Article 86. In the words of the Advocate-General

"it is sufficient, in order to show that there has been an abuse, that the undertaking in this position uses its dominant position for purposes contrary to the objectives of the Treaty".

It was clear to the Advocate-General that the conduct of the Dutch producers could not be held to conform with the objectives of the

common organisation of the market (i.e. the sugar market) and that, taking into account their dominant position, it represented an abuse of that position. It was expressly stated that Article 85 (1) was not applicable to the 'agreement' between the producers and the importers since, if there were an agreement it could only, in fact, have been dictated by the producers.

In its judgment<sup>3</sup>, the Court stated that it was clear from the documents produced that RT either expressly or implicitly told the dealers, or deliberately created in their minds, the impression, that it would not supply them with sugar or would not supply them with all the quantities for which they applied unless they complied with its restrictive export policy. By compelling dealers to channel their exports to specific consignees or destinations and to impose these restrictions on their own customers, RT had restricted the outlets of those dealers and indirectly of their purchasers, which is a practice expressly mentioned in Article 86 (b).

With regard to the Dutch producers CSM and SU, the Court considered that the Commission had failed in its submissions that the producers had abused their dominant position by inducing their dealers to adopt a course of conduct prohibited by the Treaty. The Commission Decision, therefore had to be annulled to that extent.

Regrettably, the Sugar Case is the only piece of jurisprudence dealing with the interrelationship of exclusive distributorship agreements and Article 86. For Article 86 to have a role to play in this area, it is necessary that the 'agreement' with the distributor be imposed upon it by the supplier or the producer; for an abuse of a dominant position to exist it is necessary that the parties are of unequal economic strength, and one of the parties exploits that difference for its own advantage.

The separate, but related question is whether a system of exclusive distribution or solus agreements entered into by a firm in a dominant position can amount to an abuse of that position. This is a point which has not been considered by the authorities although, by analogy with the statement of the Court with regard to Commercial Agents in the Sugar Case, and discussed infra, it can possibly be deduced that if the effect of the series of agreements taken as a whole is to make market entry by other enterprises impossible or to make their penetration of the market very much harder than it would be in a normal situation, the agreements may indeed amount to an abuse of the dominant position.

In this connection, the Commission have proposed amending Regulation 67/67 so that the automatic exemption thereby provided is limited to situations where the goods sold by a manufacturer under such exclusive dealing arrangements do not represent more than 15% of the market for such goods in a substantial part of the common market. This is, it is submitted by the Author, designed specifically to avoid the abuse which could exist.

If the Commission considers that there has been an unnatural or excessive foreclosing of the market by a dominant firm signing up all potential distributors in the sector exclusively in respect of his products, there is little doubt that it has the necessary powers to go against that firm, both in terms of Article 85 and Article 6 of Regulation 67/67, and in terms of Article 86. Although the Continental Can doctrine is not favoured, there is still a school of opinion which suggests that Article 86 can be used to prevent the creation of an anticompetitive market structure per se. This is however, not a view which the author would support. It is submitted

that Article 86 is concerned only with market behaviour, it is neutral towards the structure of the market as such.

In an oligopoly situation, it is thought that the same criteria as in monopoly would apply. The attitude of the Commission towards the distribution systems of the petrol companies has been extensively set out in the Oil Report<sup>5</sup> and it is not intended to discuss those points further here. Suffice it to say that the Commission was unable to substantiate any breach of the Community antitrust rules in respect of the behaviour of the oil companies during the period covered by the Report.

In so far as the oligopolists could be dealt with in terms of Article 85, that Article would be applied. However, it is not considered that Article 85, nor indeed Article 86 can be applied to a situation of pure parallelism of behaviour, as has been argued by certain writers wishing to extend the concept of 'concerted practice' beyond its natural boundaries. Article 86 could only be applied to the oligopolists where either each could be shown to have abused its individual dominant position, or they could together be shown to have abused a dominant position which they held jointly. The author's views on this possibility have been made clear elsewhere<sup>6</sup>, and they will not be reiterated here. Nevertheless, it can be stated that the Commission have failed to establish in any formal proceedings that there exists such a concept as a 'collective dominant position' never mind proving what collective behaviour could constitute an abuse thereof.

## II. COMMERCIAL AGENCY

The second form of distribution agreement or system which will be examined in light of Article 86 is that of Commercial Agency. A commercial agent properly so called has no economic independence from its principal and forms, in reality, merely an arm of the latter's business undertaking.

However, such a relationship may fall within the scope of Article 86 as the Commission pointed out in its Decision in the Sugar Case<sup>7</sup>, as subsequently ratified by the Court<sup>8</sup>.

In that Decision, the Commission assessed the behaviour of the German producer SZV towards its buyers in terms of Article 86. SZV, which was a joint selling agency for producers in southern Germany, sold the greater part of the production of its members and decided its prices and sales conditions on a unilateral basis; when SZV members sold sugar independently they used the same agents; SZV had a market share of some 90% to 95%, which enabled it, in the view of the Commission, to act independently of the views and actions of its competitors.

In the Commission's opinion, SZV abused this dominant position by obliging its agents not to sell sugar from other sources without its consent. In this way it was able to ensure that no foreign suppliers could sell through dealers selling SZV sugar. The Commission thought that this restriction restricted the opportunities of foreign suppliers to sell on the southern German market by virtue of the fact that dealers appointed by SZV could not be customers of the foreign suppliers. In the analysis, it was considered that the obligation on agents not to sell foreign sugar

without prior authorization, constituted an improper practice in contravention of Article 86 when it was imposed by a firm in a dominant position.

Thus, the position appears to be that whilst it is perfectly permissible for a firm to restrain its agents from dealing<sup>1</sup> in the products of competitors, that right ceases to exist as soon as the supplier acquires a dominant position. If this is the case, the question for the practitioner is the stage at which a sufficient degree of dominance is achieved for this right to cease to exist.

It is not surprising that this point was challenged by SZV before the Court, and although the Advocate-General had not dealt specifically with the question, the Court discussed the point at some length.

SZV challenged the Commission's findings on the principle that, as its relationship with the intermediaries with whom it had entered into the disputed agreements was one of commercial representation, Article 86 did not apply to the contracts. The Court decided that the agreements in question were, in fact, trade representatives' contracts, in particular because they conferred on the intermediaries the attributes of a trade representative under German Law and because the representative was under an obligation to negotiate or conclude contracts in the name and for the account of the principal. Under German law it was stated that it was permissible to include in such contracts a prohibition on trade representatives competing with their principal without the latter's consent, even if there is no express provision to this effect.

Nevertheless, for the purposes of the application of Articles

85 and 86, the relationship between a supplier and his intermediaries must be examined only in terms of Community Law; the provisions of national law, whilst relevant to the discussion, are not conclusive of the legal position in terms of those Articles. The Court then continued by discussing the nature of the relationship between the principal and the commercial agent and the requirements of such a relationship being properly constituted. Its conclusion was that an abuse could not exist where a principal forbade an auxiliary organ, such as the agent, to trade in products which could compete with his own.

The position would be different in the Court's view if the agreements allowed the 'agent' to carry out duties which from an economic point of view could be considered as similar to those carried out by an independent dealer, because in particular, they provided for the agents accepting the financial risk of the sales or the performance of contracts entered into with third parties. (Quare the Court would apply this view also to del credere agents ? The author considers probably not)

In such a case, "if a clause restricting competition is agreed between principal and agent and the principal is a firm occupying a dominant position, that clause may constitute an abuse of a dominant position, within the meaning of Article 86, as being likely to consolidate that dominant position". From the author's examination of the terms of Article 86, it is difficult to see into which of the categories of abuse listed such a practice might fall. Certainly the agreement between principal and 'agent' will fall within the terms of Article 85 (1) and may be dealt with in accordance with the terms of that provision. However, the Court does not make it clear why such an agreement is also an abuse of a dominant position.

However, in the Court's opinion "even clauses prohibiting competition imposed by an undertaking occupying a dominant position on trade representatives may constitute an abuse". This abuse is seen as the removal from the market of all suitably qualified agents with whom foreign suppliers could hope to deal with a view to penetrating the market in question. It is seen from this analysis that the Court appears to be returning to a Continental Can type of approach to market structure<sup>9</sup>.

Although that case has not been specifically mentioned by the Court in any of its subsequent judgments, its rationale has at least been alluded to in a number of cases. The Continental Can case will be discussed infra.

In the Sugar Case, having made the general statement of principle quoted above, the Court decided that, in the particular circumstances of the South German market, there existed a sufficient number of wholesalers and dealers who had no commercial or trading links with SZV and to whom foreign producers could turn if they wished to penetrate the German market. Consequently, the clauses in the agreements concluded by SZV could not be seen as being in contravention of Article 86.

As with exclusive distribution agreements discussed in Section I, supra, the Sugar Case is the only formal judgment dealing with the question of commercial agency in Article 86. The statement in that case does, however, appear to be clear. Whereas, commercial agency is unobjectionable so far as Article 85 (1) is concerned, it may in certain circumstances constitute an abuse of a dominant position prohibited by Article 86. For an abuse to exist it seems to be necessary that the dominant firm, or in an oligopolistic

situation a number of dominant firms, have entered into agency arrangements with all, or almost all, the firms, in the area who are able and qualified to engage in the trade in question. This would appear to require that there be a number of potential agents in the area, and, the author would suggest, some degree of monopolistic intent on the part of the dominant firms must be a prerequisite. In this context it is suggested that the abuse which is being struck at is the monopolisation prohibited by the United States Sherman Act<sup>10</sup>. A dominant firm which finds itself in a position where all the agents in the area are tied to it cannot it is submitted, be condemned for something which it has not actively or at least passively striven to achieve.

The abuse appears to be that of consolidation or reinforcement of an existing dominant position. Whether such action is, in fact, an abuse has not been tested since the much-criticised Continental Can case, and there must be some doubt as to the applicability of Article 86 to such behaviour. The only paragraph of Article 86 which could be seen as having any relevance to the behaviour criticised is paragraph (b) dealing with the limiting of markets to the prejudice of consumers; certainly SZV's behaviour was to the detriment of consumers, but whether the sole fact of their having signed up most of the agents in the area can be considered as limiting markets is far from clear. It is not limiting its own markets, but making the markets of others more limited. It is submitted that this is not what Article 86 (b) is aiming at.

In conclusion, it is certain that the Community authorities should have the power to deal with behaviour which leads to a

foreclosing of the market and a resultant lack of competitive opportunities. However, Article 86 does not appear to provide such powers and, if the Commission consider them essential, they should approach the Council with a view to having an express grant made thereof.

### III. GENERAL COMMENTS

The observations which are to be made in this part relate not only to exclusive distribution and commercial agency, although they are particularly relevant in those areas, but also to other methods of distribution undertaken by a firm in a dominant position.

In the Hoffmann-La Roche/Vitamins Case in 1979<sup>11</sup>, the Advocate General (Reischl) stated that, in his opinion, the Commission had been correct in stating that an express obligation on purchasers to obtain their supplies from Hoffmann-La Roche, which had a dominant position was incompatible with the competition rules of the Treaty. They took away the purchaser's freedom of action in purchasing and excluded other competitors from those markets and thus served to reinforce competitive relationships and strengthen the dominant position in the market which already existed. In the Advocate-General's opinion it was irrelevant whether the obligation extended to all the requirements of the purchaser or merely a large part thereof.

In its judgment, the Court affirmed the view of the Advocate-General, by stating that:-

"An undertaking which is in a dominant position on a market and ties purchaser - even if it does so at their request - by an obligation or promise on their part to obtain all or most of their requirements exclusively from the said undertaking abuses its dominant position within the meaning of Article 86 of the Treaty..."

The same position would apply even if the undertaking, instead of tying the purchasers by a formal undertaking applied, either under the terms of an agreement concluded with those purchasers or unilaterally, a system of fidelity rebates. This question will be further discussed in Section B *infra*.

Although the statement in the Vitamins case is in general terms, it appears to be directed particularly at instances in which the exclusive purchase obligation is reinforced by the application of a system of rebates to encourage the purchaser to obtain all his requirements, or a substantial proportion thereof from the dominant supplier.

However, it is submitted that the ratio of the statement would be equally applicable to a situation where no such rebate system were offered.

In conclusion, it appears to be the position that if a dominant firm seeks to tie its purchasers to it, whether this tying is done at the latter's request in order to (say) ensure continued supplies, such an arrangement will fall foul of Article 86. If this is the case, it is difficult to see how the dominant firm can organise the distribution of its products, other than directly through some part of its enterprise without there being the danger that Article 86 will be infringed.

Mention should also be made here for the sake of completeness, of the fact that Article 86 is equally applicable to an abuse of a dominant position on the demand side of the distribution system. The Commission made it clear in the Eurofima Case<sup>12</sup>, that it would intervene where, because of the special characteristics of the

market in question, buyers or a single purchaser had a dominant position vis-a-vis their suppliers. This situation will, of course, be the exception rather than the rule but may happen where the sole purchaser in a Member State is, for example, a nationalised industry.

In Eurofima, the position was that Eurofima was a purchasing agency used by the railway companies of several Member States for their purchases of rolling stock and accordingly it had a great deal of market power in relation to the producers of such goods whose only outlet was through Eurofima. In its investigations, the Commission found that certain of the practices in which Eurofima had engaged were abusive, and these were removed by that undertaking so making the adoption of a formal decision unnecessary.

#### B. . ABUSIVE BEHAVIOUR

This Section of Chapter 4 is concerned with an examination of various types of behaviour which, when used by a firm in a dominant position, may be considered abusive. In some instances, such behaviour might be struck at on other bases even if it were that of a non-dominant undertaking, and some forms of conduct could also be considered in light of Article 85. However, this Section is concerned only with the application of Article 86.

Mention is made in general at this point of the general definitions of dominant position and abuse thereof discussed in Chapter 2 supra, to which reference is made.

The discussion will relate to forms of tying conduct such as loyalty and fidelity rebates and related concepts, and to pricing behaviour falling within the ambit of Article 86. Equally, refusal to supply is considered in Section C, and concentration control in Section D of this Chapter.

## I. LOYALTY/FIDELITY REBATE SYSTEMS

The first type of potentially abusive behaviour which will be considered in this part of Section B is the use of systems of loyalty or fidelity rebates by the dominant firm to encourage its customers to continue to trade only, or primarily, with that dominant firm.

Systems of aggregate rebate may fall within the prohibition of Article 85(1) where they are applied by a number of undertakings acting together. Although in a dominant firm situation, aggregate rebates play a less important role, since it is usually only with regard to that undertaking's products that the rebate is calculated, such systems may still be condemned where the dominant firm's pre-eminent market position on one market is used to ensure loyalty from its customers in other markets where there exist potential competitors and on which market the dominant firm is less powerful.

In the Sugar Industry Decision<sup>13</sup>, the Commission condemned the behaviour of the German sugar sales agency SZV. In addition to various agreements with local representatives, binding those representatives to it, SZV had used a system of annual quantity and fidelity rebates. Indeed SZV invoices stated clearly that an annual quantity discount of DM 0.30 per 100 kg would be granted at the end of each contract year on the contract price where the purchaser's annual requirements were covered exclusively from members of SZV. In the case of some customers, the discount was granted immediately and deducted from the invoice. According to the parties, the discount continued to be available even if the buyers

bought sugar elsewhere up to a certain amount. However, the Commission could find no evidence of this, and indeed the Commission's investigations showed that the discount had been removed at least in some cases where the buyer had imported sugar, and in others such removal had been threatened.

So far as the Commission could determine, the use or threat of use of the sanction of removal of the rebate offered by SZV had ensured that imports were discontinued.

In its analysis, the Commission stated that SZV had improperly exploited its dominant position by the granting of fidelity rebates. It considered that the granting of such rebates or discounts, which did not depend on the amount bought, but only on whether the annual requirements of the buyer were covered exclusively by SZV was an unjustifiable discrimination against buyers who also bought sugar from sources other than SZV. In the situation in question, since the buyers relied on SZV for at least part of their requirements and needed regular supplies, the disadvantage of losing the rebate was usually greater than the benefits of buying sugar from other suppliers even if they offered it at more favourable rates.

The Commission saw the basic feature of the fidelity rebate system as being the means for the dominant firm to control the purchases from foreign producers made by each customer, whose annual requirements varied little. The fact that the rebate was granted in some cases even where the customer's total requirements were not met exclusively from SZV did not alter the position, as the threat that such rebates would be withdrawn was sufficient to prevent customers from making large and regular imports.

In conclusion, the Commission stated that:-

"If a fidelity rebate of this kind is granted by an undertaking which holds a dominant position in order to limit opportunities for imports still further and to strengthen that dominant position, it constitutes an abuse which is likely to affect trade between Member States. The granting of a fidelity rebate by SZV is therefore a violation of Article 86."

A fine was imposed by the Commission relative to this infringement of Article 86, and SZV appealed to the Court for annulment of the Decision.

In the case which followed<sup>14</sup>, the Advocate-General (Mayras) stated that he considered that the granting of loyalty rebates by SZV amounted to an abuse of its dominant position prohibited by Article 86 in that it amounted to the imposition of unfair purchase or selling prices and/or the application of dissimilar conditions to equivalent transactions with other trading partners. The Court upheld the view of the Advocate-General arguing that the system was likely to limit markets to the prejudice to consumers because it gave other producers and particularly those having their places of business in other Member States no chance, or restricted their opportunities of competing with sugar sold by SZV. The loyalty rebate which might further consolidate SZV's position was therefore incompatible with Article 86(b)

In the Vitamins Decision taken against Hoffmann-La Roche in June 1976<sup>15</sup>, the Commission attacked the fidelity system used by Roche in its dealings with purchasers of certain vitamins.

In the agreements concluded by Roche there were exclusivity clauses providing that the customer should buy all, or a very large proportion of its requirements from Roche. In the event that such an obligation was broken, the fidelity rebate offered by Roche was lost in respect of all that customer's purchases from Roche, and not only in respect of the amount of such purchase. In the particular facts of the case, the restrictive effects were aggravated by the fact that the rebates were calculated on the basis of all the purchases of that customer from Roche of vitamins and were not restricted to purchases of vitamins of that particular type, so that rebates were aggregated over the purchases of vitamins from other groups.

It should not be thought that such rebates, even if aggregated over the whole range of products produced by a manufacturer, will inevitably constitute a breach of Article 86. In the case of Roche, however, Roche held over 95% of the market in certain vitamins and accordingly, customers requiring to purchase several vitamins would need to buy at least some of their requirements from Roche. Roche was therefore able to abuse its dominant position on the markets on which it held such a position to ensure that customers purchased vitamins from it relative to other markets in which its position was less strong and in which customers would not necessarily have had to deal with it.

The Commission considered that, since the rebate was only available where the purchaser had retained its exclusivity towards Roche, the behaviour of Roche amounted to treating similar transactions in a dissimilar fashion and the conditions of Article 86 (c) were therefore met.

As had been made clear in the Sugar Case, a fidelity rebate offered by a dominant firm cannot be analysed in the same way as a quantity rebate calculated solely on purchases from the relevant manufacturer, but as a form of price concession designed to deter customers from placing orders with competing manufacturers. Fidelity rebates which may reinforce dominance are incompatible with Article 86.

Roche appealed to the Court and in a judgment of February, 1979<sup>16</sup> the Court upheld the Commission's Decision in all respects except with regard to Vitamin B3. In his Opinion, Advocate General Reischl stated that:-

"if advantages in relation to supply are granted in respect of customer loyalty and not on the basis of cost savings to the supplier, there is a compulsion very similar to that exerted by an express tie".

"if a purchaser receives rebates on the basis of his total supplies (total turnover rebate) , on the understanding that he obtains the whole or a large part of his supply from the party granting the rebate, a competitor can obtain the order only if his offer compensates for the loss of the rebate. Even where the rebate is not very high, this is frequently extremely difficult or quite impossible, so that in practice access to such customers is blocked".

These quotes from the Advocate-General's Opinion encapsulate the problem which the Commission are attempting to prevent. If the dominant firm is able to offer rebates to its customers on the basis that they obtain all their requirements from it or lose the rebate for that year, the offeror firm seeking to compete with the dominant firm must offer a very substantial discount to outweigh the cost to the purchaser of the loss of the rebate which has been calculated on the basis of purchases to that date. Thus even if the purchaser is offered substantially better prices for a single transaction from another manufacturer, it is unlikely that he can afford to accept such an offer.

In its judgment, the Court affirmed both the view of the Commission and of the Advocate-General and ruled that the effect of fidelity rebates was to apply dissimilar conditions to equivalent transactions with the effect that Article 86(c) was infringed.

In its analysis of a related concept, the Commission and the Court considered the position of the so-called 'English Clause' in light of the EEC rules of competition.

In terms of the English Clause, a purchaser who wished to obtain supplies from a manufacturer other than Roche was entitled to approach Roche with details of the lower quote. If Roche was not prepared to match this lower quote, the purchaser was free to place his order with the competing manufacturer without losing the fidelity rebate earned to that time. The same principle applied if Roche was unable to cover the entire requirements of the customer due to a shortage.

The Commission considered that the English Clause amounted to a very limited relaxation of the exclusivity system operated by Roche. Although the function of the clause, as described by Roche, was ostensibly to enable purchasers to obtain their requirements other than from Roche it was truly to enable Roche to learn the prices and terms offered by its competitors. Despite the fact that the prices charged by all vitamins producers were ostensibly public through the use of price lists and the like, the practice in the industry was to offer particular customers more beneficial prices or terms in order to secure their business. It was these particular terms and conditions, as opposed to the generalisations appearing on published price lists which Roche was able to discover. In Roche's case the scope of the English Clause was further delimited by the

necessity that the more favourable offer came from a 'reputable' dealer in the customer's territory - thereby excluding offers from other Member States.

In each case, it was open to Roche to decide whether or not the customer was to be permitted to accept the more favourable offer i.e, whether a competitor was to be allowed access (however restricted) to the market. Since only 'reputable' manufacturers were included, it was open to Roche to exclude any offer made by a manufacturer which was in such terms as might lead Roche to believe that it was, say, selling below cost with a view to attaining a larger share of the market. On the practical level, Roche was unlikely to permit undercutting of its prices to take customers from it and it would usually reduce its prices to those of the offer so preserving its exclusivity of supply.

In the appeal before the Court, Advocate-General Reischl stated that the existence of the English Clause did not affect the existence of abuse resulting from the exclusive dealing arrangements into which Roche had entered. What was important was that, according to the wording of the clause, Roche decided on the possibility of obtaining supplies from third parties, and that, in the event of Roche intervening, the purchaser was no longer free, and would no longer fulfil the conditions for the grant of the rebate, if he were to obtain supplies elsewhere.

In its judgment, the Court stated that it was possible for the English Clause to remedy some of the unfair consequences of the exclusive purchase obligation. However, the purchaser's opportunities for exploiting competition for his own benefit were more

restricted than first appeared. The reasons for this have been dealt with in the Commission's analysis. In the Court's view the English Clause did not remove the discrimination resulting from the fidelity rebates between purchasers in similar circumstances depending on whether or not they reserved their freedom to choose their suppliers. Further, the English Clause did not remedy the distortion of competition resulting from the clauses obliging purchasers to obtain their requirements exclusively from Roche and from the fidelity rebates on a market where an undertaking in a dominant position was operating and where for this reason the structure of competition had already been weakened. Roche's customers were obliged under the English Clause to inform it of more favourable offers made by competitors together with the particulars thereof - so that it would be simple for Roche to identify the competitor. By its very nature, this placed at the disposal of Roche information about market conditions and also about the alternatives open to, and the actions of, its competitors which was of great value for the carrying out of its market strategy. The obligation on customers to notify competitors' offers, whilst the customers may have an obvious commercial interest in not disclosing them is of such a type as to aggravate the exploitation of the dominant position in an abusive way. Finally, by means of the English Clause it was for Roche to decide whether, by adjusting its prices or not, it will permit competition. It is able in this way to vary its market strategy in so far as it affects its customers and its competitors.

For all these reasons, the Court decided that the English Clause was not of such a kind as to take it out of the category of

an abuse of a dominant position, which view of the Commission had been reached by means of a proper construction and application of Article 86 of the Treaty.

In conclusion, it can be stated that it appears from the ratio of this judgment and from the Commission's Decision which preceded it, that the use of the English Clause by a firm in a dominant position will, in general, constitute an abuse of a dominant position. Clearly, the clause will require to be examined in each individual case as the Court envisaged the possibility that the clause might have beneficial effects in lessening the abusive or anti-competitive effects of the use of the fidelity rebate system of exclusive purchase obligations. However, it is submitted that in the majority of cases, such an English Clause will not affect the position with regard to those other practices, and indeed may constitute a further abuse in that it enables the dominant firm to learn more about its competitors and their market policies than it could otherwise have done.

Also, the problem of the English Clause is only to be seen in light of Article 86; if the firm using such a clause is not in a dominant position, there will be little or no market sanction which could be applied in case of any breach thereof. The English Clause, and indeed the whole rationale of the fidelity/loyalty rebate system relies on the fact that the purchaser will have to deal with the firm using such systems for at least some of its requirements. If there exists a reasonable degree of competition, and several manufacturers offering the relevant products for sale, there will be no need for the purchaser to deal with the dominant firm and thus no

reason why it should accept less favourable terms in respect of some of its purchases. Thus, the problem of fidelity rebates is one solely of relevance in a situation where the applicant of the system enjoys an actual or virtual monopoly in the product concerned or in one product of a series, where it is usual for purchasers and other intermediaries on the market to deal in all the products in the series.

## II. ABUSIVE PRICING BEHAVIOUR

The problem of abusive pricing behaviour is central to any consideration of the abuse of a dominant position prohibited by Article 86 of the Treaty since such pricing behaviour is obviously the means by which the dominant firm will be able to reap the benefits which will be derived from the behaviour in question. As can be seen from an analysis of Article 86, the imposition of unfair prices is specifically mentioned as an abuse in sub-clause (a). Further as has been shown in Part I, supra, abusive pricing can also exist in terms of sub-clause (c) of Article 86 as being the application of dissimilar conditions to equivalent transactions with other trading parties. However in this Part, consideration will be of two cases in which it was decided that the dominant firm's pricing behaviour constituted an abuse of its dominant position per se.

In General Motors Continental<sup>17</sup> in December, 1974 the Commission imposed a fine of 100,000 ua for what it considered to be an abuse of a dominant position. The facts of the case were that GMC had been granted the sole right under Belgian Law to issue certificates of conformity for General Motors vehicles which had been registered abroad. Such a certificate was necessary for the vehicles to be used on Belgian roads.

Since GMC had been made sole grantee of such certificates by Belgian law, it had a dominant position on the market for the issue of certificates of conformity for Opel vehicles manufactured by General Motors outwith Belgium. The Commission decided that GMC had abused this dominant position by charging importing consumers excessive prices for the issue of such certificates.

The existence of such an abuse was established by the Commission from the fact that GMC had charged not only the cost element of the examination of vehicles for the issue of such certificates but also non-recurring items of expenditure on type approval. The average charge of Bfrs 5000 was based exclusively on expenditure relating to General Motors American models; however, the cost of inspecting Opel vehicles was lower than that for American models and, since GMC could expect to sell considerably more Opel vehicles than American vehicles in Belgium, the apportioned cost per vehicle should have been considerably less. In fact, the cost analysis which GMC itself later carried out showed the type approval costs for Opel vehicles to be only Bfrs 123 as against Bfrs 3654 for American vehicles. Further, other Belgian firms which carried out inspections on behalf of other manufacturers similar to those undertaken by GMC had charged only Bfrs 2500 or less. In the Commission's opinion, GMC's situation could not be seen as so different from that of other examiners as to justify inspection fees twice those of other manufacturers.

As a result of these differences, the Commission decided that GMC had abused its dominant position because of the disparity between actual costs incurred and prices actually charged, within the meaning of the second paragraph of Article 86 and heading (a) thereof.

As an additional point the Commission pointed out that since GMC's certificate pricing structure only affected cars which had been imported into Belgium by persons other than authorised Opel dealers appointed by GMC, who would only bear the Bfrs 123 actual costs of inspection, acted to detriment of parallel importers who were disadvantaged to a greater proportion than authorised dealers. There was therefore a discrimination within the meaning of Article 86 because equivalent transactions were treated in a dissimilar fashion.

GMC appealed to the Court for annulment of the Decision and in October, 1975, Advocate-General Mayras stated in his Opinion<sup>18</sup>, that the excessive price charged by GMC was an abuse of its dominant position by the mere fact that GMC had imposed unfair prices or trading conditions. However, the Advocate-General did not consider that GMC's infringement of Article 86 had been intentional, but merely negligent and recommended that the Court annul the Commission's Decision insofar as it imposed a fine on GMC whilst rejecting the applicant's other conclusions.

The Court, however, went further than the Advocate-General and annulled the Decision in its entirety. In the Court's view, although an abuse could exist in the imposition of a price which was excessive in relation to the economic value of the service provided, GMC had quickly reduced its charges after complaints had been made and had refunded the excess to the parties concerned, which reduction and refund had taken place before the Commission had commenced its investigations. GMC had established that it had charged the rate applicable to American vehicles only until it had calculated

the actual cost of the service; once such calculation had been made, it had reduced its rates to the economic cost and reimbursed those persons who had complained to it.

As a result of this fact, the Court stated that, although the Decision could be explained by the Commission's wish to react and be seen to react energetically against any tendency to abuse what was clearly a dominant position, its intervention had been unjustified in the actual temporal and factual circumstances in which it took place. Therefore, it annulled the Decision but ordered the parties to bear their own costs.

Although the GMC Decision illustrates the potential abusiveness of the imposition of prices which bear no relation to the economic value of the product or service in question, the application of Article 86 to such a situation would, it is submitted, involve the Commission in a task for which it is unsuited and has insufficient staff. How the Commission are to determine what the economic value of the product or service is, is a problem which is of almost insurmountable proportions. What profit margin is to be considered as appropriate? What share of the overheads of the firm is each product to bear? What is the cost of each product? What is its economic value? All these questions remain unanswered and Commission incursions into this field have not met with much success as can be seen from the Chiquita Decision<sup>19</sup>.

In conclusion, although the imposition of unfair prices is undoubtedly an abuse within the meaning of Article 86 of the Treaty, the problems inherent in the establishment of the fact that the prices in question are in fact unfair and therefore constitute

an abuse are likely to prevent such a finding being made and subsequently upheld before the Court.

The second case which will be examined in this context is that of Chiquita and United Brands Co in December, 1975<sup>20</sup>.

In its Decision, the Commission stated that UBC had abused its dominant position by charging its distributor/ripeners in the Member States concerned, different prices for Chiquita bananas - such a practice falling clearly within Article 86 (c) of the Treaty. Although in its definition of dominance in the UBC Decision, the Commission specifically refers to the power 'to determine the prices of the relevant goods', it does not make much of UBC's substantial pricing discretion in its findings.

Dominance per definitionem involves a substantial pricing discretion; that UBC possessed such discretion is evidenced by the fact that they were able to charge higher prices than their competitors who, it can be argued, were selling bananas of comparable quality. Such discretion was not in UBC's case, and indeed can never be, total; there must always exist a price (evidently higher than that which UBC was charging) at which consumers would presumably switch to competing brands. What is to be ascertained by the control authorities is whether the degree of pricing discretion which exists is sufficient to found a presumption of market dominance; this must of course, depend to a large extent on the manner in which the dominant firm exploits this discretion.

Such a practice of charging distributor/ripeners differing prices has a tendency to maintain different price levels in each of the Member States. Accordingly the distributor/ripeners

are placed on an unequal basis if they wish to sell UBC bananas in Member States other than that in which they are established. This it would be relatively simple for them to do were they not prohibited from reselling green bananas. It is impossible to fault the Commission on this reasoning and, indeed, it is clear that such conduct will constitute an abuse of a dominant position.

However, the Commission then went on to state that UBC had also abused its dominant position by the charging of unfair prices to certain of its distributor/ripeners. UBC's marketing policy - particularly its prohibition on the sale of green bananas - had led to the effective segregation of national markets and had enabled UBC to charge and maintain different prices on each market. The Commission recalled that in the DGG/Metro case, the Court had stated that a difference in price between the controlled price in one Member State and the price of the product reimported from another Member State may be a determining factor in an abuse of a dominant position if it is unjustified by any objective criteria. In the case of Chiquita bananas, the Commission considered that the price differences were wide and could not be justified objectively.

UBC's lowest prices were charged in Ireland and, according to UBC, still enabled it to make a profit, albeit a small one in relation to that achieved from sales in other Member States. Indeed customers in Germany and Benelux had to pay up to double the price charged in Ireland for Chiquita bananas. Further the Irish prices were c.i.f. Dublin and in other Member States the prices were all f.o.r. Bremerhaven or Rotterdam. Thus the Irish prices should have been higher than those in the other areas due to the higher transport costs, but this was not the case.

The Commission, therefore, concluded that the prices charged by UBC were excessive in relation to the economic value of the product supplied. Such excessiveness was confirmed by the substantial difference of 30 - 40% between the prices of unbranded bananas sold by UBC and those sold under the Chiquita label, although the standard of unbranded bananas was only slightly lower than that of Chiquita bananas. Although the price charged by UBC for its Chiquita bananas was undoubtedly exploitative, this can be explained by reference to various factors including the brand loyalty which UBC had built up by means of an extensive advertising campaign. Also it could be argued that competition with lower priced bananas of other brands would eventually force UBC to lower its prices in any case.

It is not true to state, as the Commission did, that UBC's marketing policy had led to the segregation of the market and had enabled UBC to charge prices for its bananas under the Chiquita label which were sheltered from effective competition. UBC's marketing policy had merely led to the segregation of the market in unripened Chiquita bananas; prices of Chiquita bananas were not sheltered from competition from other banana importers such as Castle and Cook and Del Monte - both of which were major undertakings in direct competition with UBC on most markets. Neither could Chiquita bananas be considered as sheltered from competition from UBC's unbranded bananas.

In the appeal to the Court for annulment of the Decision<sup>21</sup>, the Advocate-General (Mayras) considered the question of abuse based on the differential pricing policy by UBC. UBC's explanation of the differing prices appeared to be that the price it charged was a

deduced price calculated by working back from the point of ultimate sale; it did not 'make' the price but simply took it passively from the strength of the demand on the market without attempting either to influence or direct it. However, the Advocate-General considered that in view of UBC's dominant position such an argument was tantamount to stating that it had the power to dictate its own laws. The reason that UBC charged what it liked on the market according to what the market could bear and applied discriminatory prices was because it did not consider that there was even a residual common market in bananas. Consequently, the Advocate-General considered that there was evidence that UBC had engaged in the abuse referred to in Article 86(c).

This does not appear to be a particularly conclusive finding; in essence, what is being said is that it can be inferred that abusive behaviour has been engaged in - it does not state that an abuse actually exists.

The Court, however, was able to state categorically that an abuse of a dominant position had been established. In particular, it referred to the fact that, armed with the market information which it had been given by its local representatives, UBC was able to impose its selling prices on the intermediate purchasers. Those discriminatory prices were obstacles to the free movement of goods reinforced by the prohibition on selling green bananas. A rigid partitioning of national markets was thus created at price levels which were artificially different - so placing certain distributor/-ripeners at a competitive disadvantage since competition had been distorted.

Consequently, the policy of differing prices, enabling UBC to apply dissimilar conditions to equivalent transactions with other trading parties thereby placing them at a competitive disadvantage, was an abuse of a dominant position.

Turning then to the question of an abuse being constituted by the imposition of unfair business conditions, namely charging excessive prices, the Advocate-General addressed himself to the question of whether imposing excessive prices was per se an abuse by a dominant firm.

The Advocate-General considered that this was so, from his reading of Article 86(a) which specifically refers to 'directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions'. Reference was also made to Article 85(1) which, whilst referring to the fixing of prices, does not state that they must be unfair. According to Mr. Mayras, the two situations could be distinguished by the different situations with which the two provisions were designed to deal; in the case of Article 85 it is the fact that the firms concerned impose upon themselves a prohibition on any unilateral price reduction; in the case of a dominant undertaking, there is no question of any agreement to fix price.

The mere fixing of prices is not an abuse; every firm requires to fix its prices. However, the infringement, according to Mr. Mayras arises when the dominant firm turns its position to account, in particular through imposing unfair prices on its customers. 'Unfair prices' were defined by the Advocate-General as "prices which are excessive and bear no reasonable relation to the consideration".

Mr Mayras made specific reference to the fact that there was no actual precedent in the Court's jurisprudence for such an abuse although in *Sirena -v- Eda*<sup>22</sup> and *DGG/Metro*<sup>23</sup> the question was dealt with in relation to price levels and the differences between domestically produced and imported products of the same type.

In conclusion it was stated that, in the Advocate-General's view, when the Commission had to deal with selling prices which had been imposed (i.e. fixed by a dominant undertaking) and were unfair because they were excessive having regard to production costs, the Commission has power under Article 86 to impose a mandatory price reduction without prejudice to the power which it has to impose a fine on the undertaking concerned.

However, it is not clear whether in the particular facts of the UBC case, the Advocate-General considered that an abuse had been found to exist although from his analysis of the fine which was appropriate he appears to believe that the abuse by way of excessive prices had been established.

The Court considered that the Commission had proceeded on the wrong basis when it founded its argument of excessive prices on a letter from UBC stating that it made a considerably smaller margin on bananas sold in Ireland than in some Member States, the contents of which letter had been retracted on two occasions by UBC. It was considered arbitrary to proceed on the basis of Irish sales which accounted for only 1.6% of the total volume of bananas imported in 1974, in order to calculate the profits which had been made on the remainder of the relevant market.

The Court stated that the imposition by a dominant firm of

unfair purchase or selling prices was an abuse to which exception can be taken under Article 86 of the Treaty; it was therefore necessary to examine whether UBC had made use of the opportunities arising out of its dominant position in such a way as to reap trading benefits which it would not have reaped if there had been normal and sufficient competition. In the UBC case, the Court considered that charging a price which was excessive because it had no reasonable relation to the economic value of the product supplied was such an abuse.

Having established the existence of an abuse, the Court then went on to discuss how the excessive element was to be determined; the excess could, inter alia, be determined objectively if it were possible for it to be calculated by making a comparison between the selling price of the product in question and its costs of production, which would disclose the amount of the profit margin. Since the Commission had not done this, by not analysing UBC's structure, the Court decided that the Commission had not adduced adequate legal proof for the evaluation of its findings. After completion of the comparison of price and cost, the question to be determined is whether the difference is excessive; if it is, it is necessary to consider whether a price has been imposed which is excessive in itself or in relation to competing goods.

Although the Court recognised that the assessment was a difficult one, it felt that the problems were not insurmountable; in particular the Commission should have required UBC to produce particulars of the constituent elements of its production costs. In conclusion, the Court stated that, although the difference in price

between Chiquita bananas and those of its principal competitors was about 7% such a percentage was not prima facie excessive and consequently unfair.

For these reasons, the Court annulled that part of the Decision dealing with abuse by way of excessive prices.

The UBC case is the first attempt by the Community authorities to move towards a public utility regulation of dominant firms. The Court's rejection of the Commission's findings illustrates the major shortcoming of such a regulation; nothing can be done to restore a competitive market structure - if UBC's prices are cut, it will increase its market share. If on the other hand, UBC's prices are not controlled, there is at least the possibility that competitive pressures will force them down eventually. The control of discriminatory prices and the removal of the prohibition of inter-dealer sales could ensure that inter-brand competition is not distorted and could prevent the abusive exploitation of the dominant position to the detriment of consumers. However, Article 86 is concerned only with the latter. The maintenance of effective and undistorted competition in the common market is not one of the goals of Article 86, although it does come within the overall cover of the Community's competition policy by way of Article 3(f) of the Treaty.

The Commission's Decision is also open to criticism on other grounds; although in its Appraisal it states that UBC must be required to cease applying unfair prices, it does not state what reduction in price is to be made, nor does it reiterate this requirement in the operative part of the Decision, which is the only part open to action for annulment. This is most unsatisfactory -

either the Commission should make a price reduction order in the Decision or it should not attempt to regulate unfair prices. Is the statement in the Decision that UBC would satisfy its obligations under the Decision if it reduced its prices to customers in Benelux Denmark and Germany by 15%, a formal obligation which can be enforced and which if not complied with will lay UBC open to further sanction by the Commission? This point was never discussed by the Court and, with the annulment of the unfair prices section of the Decision, it is unlikely to have to be determined in the future. If UBC had reduced its price by the suggested 15% would this have precluded further action by the Commission?

The Commission adopts a strange pose on this matter; in the UBC Decision it argues strongly that it is not seeking to adopt a public utility regulation of dominant firms yet it seeks to control their prices. It can be argued, as it has been done, that it is proper that the Commission should have power to control the prices of dominant firms by a public utility regulation. However, if it is to have this role - and this is in the final instance a political rather than a legal decision - it will be necessary to strengthen the Commission's staff considerably to enable it to carry out the onerous obligations attached to such a control in an effective manner. It is submitted that, at the present time, the Commission lack the necessary expertise to conduct such a function.

### III. ABUSIVE TYING PRACTICES

The third Part of this Section deals with forms of conduct on the part of a dominant enterprise, whereby that enterprise seeks to impose conditions or requirements on its customers or dealers

preventing them from acting in certain ways; insofar as these types of conduct relate to distribution and to pricing, they have been discussed in Parts I and II supra.

In United Brands Co. in 1975<sup>24</sup>. the Commission attacked the requirement imposed by UBC on its distributors/ripeners that they must not resell UBC bananas to competing ripeners and were not to resell UBC bananas whilst these were green. In addition, restrictions were placed on distributor/ripeners dealing in competing bananas and they were not able to sell bananas to dealers from other countries.

Owing to the highly perishable nature of bananas, it is only possible for them to be transported any distance whilst in a green state; once they have reached the yellow stage in which they are desirable to customers, they have only a very limited shelf life and are very prone to damage in transport, UBC's prohibition on the resale of green bananas therefore amounted to a prohibition on exports and thus maintained an effective market segregation - so facilitating UBC's differential pricing policies, discussed in Part II, supra.

UBC argued that the reason for the prohibition was to guarantee the quality of products sold to the consumer; however, the Commission rejected this view since it was not merely the sale of green bananas to consumers which was prohibited but all sales of green bananas. However, Article 86 is not concerned with the distortion of competition within the common market, but rather with ensuring that consumers (as that term is used in its widest sense) are protected against exploitation of a dominant position. A clause which prohibits horizontal trading in green Chiquita bananas is such an abuse.

As has been mentioned above, UBC appealed to the Court<sup>25</sup>, and in that case, the Advocate-General stated that it appeared doubtful whether distributor/ripeners wished to resell the bananas which they had purchased; equally the possibility that it was in the interest of ripeners to sell bananas to other ripeners could be ruled out, in the Advocate-General's view - bananas were purchased to be ripened. What was important was that the ripeners be in a position to buy, ripen and sell Chiquita and other bananas to customers of their own choice.

The Advocate-General considered whether the restriction on the sale of green bananas could be justified in terms of Article 85 (3) but concluded that it could not; insofar as UBC prohibited the sale of bananas which were 'unripe' and let it be known that only the sale of bananas which were completely yellow could be permitted, this requirement could be seen as going further than that which the generally accepted rules allowed.

In his view, the clause prohibiting the sale of green bananas was not merely a constituent part of the dominant position but one of the consequences flowing from that position and in itself an abuse.

The Court confirmed the opinion both of the Commission and of the Advocate-General and stated that the prohibition on the sale of unripened bananas - even although the perishable nature of the product limited the opportunities of selling to the duration of a specific period of time - was an abuse of a dominant position since it limited markets to the prejudice of consumers and affected trade between Member States by the partitioning of national markets.

Other forms of tying practice fall into the general category of refusal to supply and are, accordingly, dealt with in Section C, infra.

In conclusion to this Part of this Section, it can be stated that the ratio to be drawn from the UBC case quoted above is that it will be an abuse of a dominant position if a dominant firm limits the freedom of its purchaser to do as he thinks fit with the goods which he has purchased from the dominant firm. Such a restriction will contribute to the partitioning of the market, and, therefore, prevent the economic interpretation which the common market was intended to facilitate. It is thus apparent that, whilst the dominant firm may impose certain trading conditions unilaterally on its customers - subject to the provisos stated in Part II supra - once the goods have been transferred from the supplier to the customer, the dominant firm must not retain any control over the goods or their ultimate disposal.

### C. REFUSAL TO SUPPLY

#### I. The Jurisprudence

The third Section in Chapter 4 of this Study is devoted to what could be considered the pure subject of this study - the situation where a dominant firm refuses to do business with a customer or would-be customer, or only offers to do so on such terms and conditions that it must be considered that it amounts to a refusal to supply.

There have been a number of Decisions and cases dealing with the problem and these will be examined in turn and an attempt made to determine in what circumstances a dominant firm may or may not refuse to do business. Also to be considered as an ancillary point is whether there is any difference in the legal approach where the customer is not a traditional customer of the dominant firm.

### Commercial Solvents/Zoja

In the Commercial Solvents Case, in 1972<sup>26</sup>, the Commission ruled that the refusal of CSC, and its Italian subsidiary Istituto Chemioterapico Italiano (ICI) to supply Zoja had infringed Article 86. This was the first Decision to concern refusal to supply, and it deserves close examination.

In 1962, CSC acquired 51% of the voting share capital of ICI; until 1970, ICI acted as a reseller of aminobutanol, produced by CSC in the United States, and sold this to many customers in the common market including Zoja, which had purchased the product since 1966 for its production of ethambutol-based specialities. In 1968, CSC had attempted unsuccessfully to acquire Zoja, and at about the same time ICI had started to produce drugs based on ethambutol, so moving into competition with Zoja. Early in 1970 CSC decided to stop selling nitropropane and aminobutanol in the EEC but advised customers that it would supply only dextro-aminobutanol - which was an upgraded intermediate product - to ICI, who could convert it into bulk ethambutol for sale in the EEC and elsewhere and for the manufacture of its own drugs. As a result of these changes, ICI advised its customers that nitropropane and aminobutanol would only be available in such quantities as had already been committed for resale.

Later in 1970, Zoja cancelled its order for aminobutanol provided for in its agreement with ICI. This step seems to have been prompted by the ready accessibility of other supplies from independent distributors at prices less than those offered under the agreement with ICI. At the end of 1970, ICI advised CSC that Zoja

had placed a new order for aminobutanol and asked whether this intermediate product could again be supplied for resale to Zoja. CSC replied that none was available.

Zoja then attempted to obtain supplies elsewhere but failed as the trail always led to one source - CSC. Therefore Zoja applied to the Commission for initiation of proceedings against CSC.

In the Decision, the Commission determined that ICI and CSC had abused the dominant position which they possessed on the relevant market by refusing to supply Zoja. It ordered them to supply Zoja immediately with nitropropane and aminobutanol in stated quantities at a price not exceeding the highest then charged and asked them to submit proposals for future supplies to Zoja. A periodic penalty was imposed to ensure compliance with the supply obligation.

ICI and CSC applied for the annulment of the Decision<sup>27</sup>.

The Court judgment deals with several aspects of Article 86, some of which have been mentioned in Chapter 2, but this section will be limited to the question of abuse of a dominant position.

The Advocate-General (Warner) commented on the fact that the Commission had held that the abuse by the CSC - ICI group of its dominant position had consisted in ceasing to supply the raw materials for which it held a monopoly to one of the principal producers of ethambutol in the EEC, namely Zoja, conduct which must lead to the elimination of Zoja as a producer of ethambutol and so to a reduction in competition. He considered that it was implicit in such a finding that there was discrimination against Zoja. It is not, however, clear how such a discrimination was created and the Advocate-General does not discuss the matter.

The Advocate-General merely states that he has no doubt that the refusal by a dominant firm to supply a user of the raw material without reasonable justification will abuse that dominant position. The question of an exception to this general principle is raised by Mr. Warner when he indicates that the position may be different where the raw material only exists because of the efforts in research and development of the dominant firm, and that firm decides to supply all the demand for the end product.

This appears to imply that, if the dominant firm retains for itself all the manufacturing and distributive functions relative to the product, it will not fall under the prohibition of Article 86, whereas if it uses other independent entities for these functions, Article 86 may come into play. This would seem to run counter to the Commission's aims in other areas to attempt to secure a wide share of the benefits arising from the exploitation of a new invention rather than to have all such benefits accrue to a single dominant enterprise.

Mr Warner states that it must, a fortiori, be an abuse of a dominant position for a dominant firm to place another trading party at a disadvantage by refusing to supply him with a raw material which the dominant firm supplies to others in an equivalent position. Such behaviour is patently an abuse of a dominant position as is made clear in Article 86 (c). However, the question which is addressed to the jurist is whether CSC/ICI had, in fact treated similar transactions in different fashions; certainly it had refused to supply Zoja and certainly other firms were being supplied with aminobutanol - but there is no evidence that such other firms were

in the same position as Zoja. CSC/ICI had accepted responsibility to meet all existing contractual obligations in respect of amino-butanol when it ceased to make such product generally available. However, Zoja had earlier forsaken the certainty of supplies from ICI in the long term for the short-term benefits of cheaper prices on the international spot market. Surely it cannot be considered that such transactions were 'similar' as that term is used in Article 86(c).

The Advocate-General referred to the OECD Report on Refusal to Supply<sup>28</sup>, which showed that such refusals were unlawful in France unless certain specified justifications existed; also refusals were controlled in Belgium, Denmark, Germany and the United Kingdom where such refusal operated against the public interest. In the United Kingdom, express mention could be made of the Monopolies Commission Report, which cited the case of a vertically integrated supplier (such as CSC/ICI), not operating under reasonably competitive conditions, refusing to supply competitors, as one calling for investigation. Whilst it is important for the Court to look at the national legislation of the Member States when it is considering its response in a case, this does not mean that if these legislations adopt a common approach to a problem that is necessarily also the legal position under the EEC Treaty. It would be preferable if these authorities were afforded merely persuasive force and the problems and possible solutions reconsidered in the light of the Community Law.

It may be desirable, indeed necessary, that the Commission have the power to rule that a dominant position is abused through refusal to supply but such power must be based on the Treaty framework and not drawn from extraneous sources.

The Court concurred with the Commission and the Advocate-General in its judgment. It stated that:-

"An undertaking being in a dominant position as regards the production of raw material and therefore able to control the supply to manufacturers of derivatives, cannot, just because it decides to start manufacturing these derivatives (in competition with its former customers) act in such a way as to eliminate their competition which in the case in question would amount to eliminating one of the principal manufacturers of ethambutol in the common market."

The Court stated that such conduct was prohibited in terms of Article 3(f) of the Treaty, and further elucidated in Articles 85 and 86 thereof; certainly, elimination of competition would be contrary to the general objectives of Article 3(f), but it is arguable that it is not caught by the prohibition contained in Article 86. Although the contrary has been argued, the author is of the opinion that it is only conduct which can be attacked under Article 86 - it is neutral towards the structure of the market as existing.

The approach which, it is submitted, should be adopted is that of the monopolization approach of Section 2 of the US Sherman Act - for a finding of abuse to be made there requires to be some form of positive conduct on the part of the dominant firm to attain and keep that position by conduct other than better business methods or superior product development.

One point in the CSC/ICI case which the author considers to have been given scanty consideration is the point that it was Zoja itself which had foresaken the certainty of supplies from ICI for the short term benefits which it foresaw on the open market. The

Court dismissed this argument by stating that when the contract with Zoja had expired it would not have been renewed in any event. Whether or not this is true, and the information on which the Court bases its view is not in the published judgment, it seems irregular to take into account possible future action when considering present behaviour. The 'what if' approach to competition law and policy is one fraught with problems and should be avoided at all costs.

For the practitioner, attempting to draw some conclusion from the case as to the position of a refusal to supply, the most lucid indication appears not in the formal part of the Court's judgment, but in the Commission's answers to questions put to it by the Court. Asked whether a refusal to sell was to be considered as an abuse in all cases where the supply of the relevant products had been discontinued, and if not, in what circumstances was it an abuse, the Commission stated that:-

"Under Community law a refusal to sell by an undertaking in a dominant position is likely to constitute an abuse of such a position. However, the possibility should not be excluded of such a refusal being legitimate in certain circumstances. Only by examining each individual case would it be possible to establish whether a refusal to sell by an undertaking in a dominant position is justified.

In any event, in cases in which:

- the dominant position is a monopoly
- the refusal to sell applies to one of the principal users, previously a customer;
- the refusal to sell gravely affects maintenance of conditions of effective competition in the Common Market; and
- no objective justification is apparent.

the unlawful nature of the refusal to sell is particularly clear".

Several points arise out of this statement; do the control authorities start at the premise that a refusal to sell by a dominant firm is legal or that it is illegal; does the phrase 'previously a customer' mean a customer until supplies were refused

or merely that that person had dealt with the dominant firm in the past - and if the latter is the case, how far into the past can the authorities go in determining who must be supplied.

Under the US antitrust legislation, individual sellers can be found in violation of Section 2 of the Sherman Act<sup>29</sup> if their refusal to deal is conceived in a monopolistic purpose - i.e. with a view to eliminating competition; however, not all refusals are monopolistic - ICI might have started to produce specialties because Zoja was making large profits in Italy. Indeed Zoja charged five times as much for its ethambutol specialties as ICI later did. Even the US legislation would permit a monopolist to integrate forward or backward by internal expansion even if it leads to monopoly of those other stages provided it is by non-predatory, non-exclusionary and essentially fair practices - the 'better mousetrap' approach. The monopoly of the second stage might, of course, lead to a strengthening of the monopoly at the first stage, but the Commission did not attempt to argue this point in its Decision - possibly because aminobutanol could be used in the manufacture of products other than ethambutol. It is therefore far from certain whether CSC/ICI's behaviour would amount to monopolisation in the US sense.

In the CSC/ICI case, it is necessary to consider what the Commission was striving to achieve. Was it seeking to protect Zoja against the loss of what had been shown to be a highly profitable business for it or was it trying to protect sufferers from pulmonary TB from the elimination of one of the three manufacturers of ethambutol in the common market. According to Mrs. Korah<sup>30</sup>, Judge

Pescatore has stated that the Court had protected Zoja, yet the Decision refers to competition both directly and indirectly in paragraph 25; it refers to Article 3(f) which objects to the distortion of competition and it refers to the elimination of competition from Zoja and, since Zoja was one of only three manufacturers in the common market, this was important to competition.

It is submitted that what the Commission should have been attempting to protect was not the competitive structure, but that it should have been ensuring that CSC/ICI's dominant position was not being exploited to the detriment of consumers; in the particular case, the Commission may have equated such a task with the protection of the previously existing structure of the market but it is submitted this is not the function of Article 86.

On a logical base, it can be argued that a refusal to sell does not fall within Article 86(c) of the Treaty since that only relates to the application of dissimilar treatment to similar transactions. A refusal to deal is patently not a 'transaction' indeed it is a 'non-transaction' and thus it cannot be the subject of an analysis in terms of paragraph (c) of Article 86. What is the 'equivalent transaction' against which the refusal is to be measured - if it is another refusal, then the two situations have been dealt with identically. The only other approach would be that of public utility - the monopolist, or indeed the dominant firm would be under an obligation to supply every customer who approached him with a view to obtaining supplies. It would have to do so, irrespective of the behaviour of the customer, and notwithstanding the fact that the customer would be free to leave the supplier to obtain supplies elsewhere at any time.

It is submitted that, except in the case of public utilities of a service nature, such as gas or electricity, such a regime would merely protect the status quo by insulating inefficient competitors from the rigours of competition - surely this would be as contrary to the aims of Article 3(f) and Article 86 as the danger which it was used to replace. If, however, this is the function of Article 86, it merely serves to illustrate that Article's shortcomings, and on the other hand, if that argument is rejected on the basis that a refusal to deal is not a 'transaction' it highlights the unsoundness of the Commercial Solvents' Decision and judgment.

#### United Brands Company

The second case to be examined here is the United Brands Decision<sup>31</sup>, and case which have been mentioned extensively in previous sections of this Chapter.

The relevant facts of the Decision, taken in December 1975, were as follows: for nearly 50 years, until 1952 A W Kirkebye A/S (Kirkebye) had been the exclusive distributor for UBC bananas in Denmark; thereafter UBC began selling to several distributor/ripeners; in 1967, UBC reorganised its sales arrangements in Denmark and appointed eight distributor/ripeners for its Chiquita bananas. In 1967, Olesen absorbed Kirkebye, thereby becoming UBC's second largest distributor/ripeners in Denmark. In addition to bananas, Olesen is also a large importer of other fruit and of vegetables. The other main companies distributing UBC bananas were Interfrugt, Holmskov and Kobenhavns Frugtauktioner.

In 1969, Olesen became the exclusive distributor in Denmark for the Dutch importer of Dole bananas, International Fruit Company of

Rotterdam and in 1973, Kobenhavns Frugtauktioner became exclusive distributor in part of Denmark for the Alba group, Hamburg, which supplied Onkel Tuca bananas; all UBC's other distributor/ripeners in Denmark sold, in addition to Chiquita, varying quantities of other brands (Del Monte, Onkel Tuca, Turbana etc.) and unbranded bananas.

Since the time when Olesen became the exclusive distributor for Dole bananas, UBC had consistently reduced the orders placed by Olesen by anything up to 50%. All the orders placed by Olesen for Dole bananas were, however, met in full. From 1972, Olesen had been selling more Dole than Chiquita bananas - however, other UBC distributors also sold more of other brands than of Chiquita. In September, 1973, UBC launched a promotional campaign in Denmark based on the fact that Denmark's four largest banana importers, Lembana, Olesen, Interfrugt and Holmskov recommended Chiquita bananas.

In April, September and October, 1973, Castle and Cook launched an extensive campaign for their Dole brand covering the whole of Europe. In Denmark, the campaign was accompanied by further sales promotions in September, and October, 1973.

On 10th October, 1973, UBC informed Olesen that it would no longer supply it with Chiquita bananas giving as a reason the advertising campaign launched that month in Denmark for Dole bananas. Olesen had been participating in that campaign in the same way as it had participated in campaigns for the other bananas, including Chiquita, which it sold.

After UBC's withdrawal of supplies, Olesen approached the

other UBC distributor/ripeners in Denmark and the Scipio Group in Hamburg with a view to obtaining Chiquita bananas but without success. As a result of the withdrawal of supplies, Olesen lost a number of customers who no longer wished to do business with Olesen if it could not supply UBC bananas. Olesen also suffered loss as a result of its being unable to use the ripening facilities constructed by it in 1967/68 to enable it to distribute UBC bananas.

On 20th February, 1974, Olesen lodged a complaint with the Commission and on 11th February, 1975, UBC agreed to resume supplies when Olesen undertook not to discriminate between the various brands of bananas which it sold and also agreed to withdraw the complaints it had lodged with the Danish and Commission authorities. This withdrawal, accordingly, took place on 13th March, 1975. The Commission, however, faced with this withdrawal, decided to initiate own initiative proceedings against UBC on 19th March, 1975.

In its appraisal, the Commission states that UBC had abused its dominant position by ceasing to supply Chiquita bananas to one of its most important customers. The effect of this withdrawal was seen as being to damage the business interests of the firm involved; in addition it would discourage other distributor/ripeners from selling competing brands, or at least from participating in sales and advertising campaigns for such competing bananas, as was normally the practice. UBC thus succeeded in keeping its distributor/ripeners within its marketing system and denied competitors access to them - so denying to competitors the essential facilities which they would require to ripen their bananas before they could be offered for sale.

The Commission considered that the excuse given by UBC for ceasing supplies could not be justified in the case of a firm of a dominant position such as UBC. The mere fact of Olesen being a distributor, albeit an exclusive distributor, of a competitor's brand was not the reason why UBC terminated its supplies; it was to the fact that there had been an advertising and promotional campaign in 1973 by Castle and Cook for Dole bananas that UBC objected. The Commission noted that UBC's distributors in other countries carried out joint advertising campaigns for a number of brands including Chiquita without objections from UBC, and Olesen had frequently participated in UBC's advertising campaigns. However, does the phrase 'joint advertising campaigns for a number of brands including Chiquita' as used by the Commission mean that the distributor in question participated in campaigns of the 'eat more bananas' type without a brand being specified and for the benefit of the industry as a whole, or does it mean advertising campaigns run by several competing companies? If it is the former the Olesen case is hardly comparable; the Commission does not make this point clear.

UBC also sought to justify its behaviour by reference to the fact that Olesen had been steadily reducing its sales of UBC bananas and, indeed, since 1972 had sold more Dole than Chiquita bananas. Two points may be made to reject this argument; firstly UBC had not objected to other Danish ripener/distributors doing the same thing, although the fact that the brand concerned, Del Monte, was not extensively advertised in Denmark may explain UBC's attitude in this regard; secondly since 1969 when Olesen had become the exclusive

distributor for Dole bananas in Denmark, UBC had, as mentioned above, consistently reduced the quantities ordered by Olesen - in some instances by as much as 50% at a time when Olesen's orders for Dole bananas were hardly ever reduced. It is, therefore, not surprising that UBC would end up selling more Dole than Chiquita bananas, nor that its sale of Chiquita bananas would fall. Consequently, such facts cannot be a justification for the termination of supplies to Olesen.

As justification for its finding of abuse, the Commission states that by preventing Olesen from advertising competing brands, UBC hampered the effective selling of such brands. Surely this does not mean that a distributor of products of a dominant enterprise is entitled to take on other, even exclusive, distributorships, for competitors of the dominant firm without the dominant firm being able to take any action against him. The basic task of the distributor is to use his best endeavours to sell the products of the supplier who appoints him, and this clearly cannot be done if there is a conflict of interests. This is, unfortunately, one of the instances where the necessities of the competition law negate one of the tenets of some other area of legislation and commercial practice; here that of agency.

The Commission states that a buyer must be free to decide what his business interests are and to choose products he will sell even if they are in competition with each other. Whilst this is certainly true, and indeed, is one of the foundations of the free market economy, surely such freedom on the part of the buyer must have as its counterpart the entitlement of the supplier to

cease supplies to that buyer if he considers that his products could be better distributed by some other person. This may not be so relevant where the products are sold by a very wide range of dealers, but it is surely important where distribution of the product is entrusted to a small group of firms who require actively to promote the product.

More logically, the Commission also pointed out that the advertising campaign to which UBC took objection was organised and paid for by Castle and Cook; in such circumstances, Olesen could hardly complain and so should not be blamed for the advertising. This rationale appears reasonable, given that UBC knew that all its distributor/ripeners were also distributors for other fruits and, in some cases, for competing brands of bananas; it is reasonable to presume that such other suppliers would wish to sell their respective products and so would run promotional campaigns possibly over the whole of the Community and pay for them with a view to promoting a brand image. Such a policy can scarcely be affected by the fact one of the distributors also distributes other products, since to concede to such pressures would rob the campaign of much of its effect. These presumptions would be reinforced where, as in the UBC case, the distributor was not expected to bear directly any of the costs of running the promotion.

For all these reasons, the Commission considered that UBC's refusal to supply Olesen amounted to an abuse of a dominant position which was likely to affect trade between Member States, as due to the withdrawal of supplies, Olesen was no longer able to import the same quantity of bananas into Denmark.

Whilst it can be seen that the refusal to supply did, in fact affect trade the argument of imports is a weak one as all bananas entering Denmark had come from non-Member States, albeit that they had been transshipped from Rotterdam or Bremerhaven. Might it not have been better to have pointed out, say, that some of Olesen's customers were in other Member States or that Olesen bought and sold bananas from and to firms in other Member States?

UBC appealed to the Court of Justice<sup>32</sup> and in November, 1977 the Advocate-General delivered his Opinion.

Mr. Mayras deals only briefly with the question of refusal to supply, although he mentions that UBC had sought to justify the refusal on the basis of Olesen's bad financial position as well as its allegedly unsatisfactory performance as a distributor. If this had been true, why did UBC choose - 2 days before the Commission sent its last list of questions to UBC relative to the investigations which it had started - to put an end to the boycott of Olesen of its own accord by entering into an agreement with Olesen. Surely Olesen's position had not changed so dramatically during the period of the refusal that it had become a desirable client for UBC.

Mr. Mayras considered that the course of behaviour by UBC had led to a temporary, although serious, deterioration in the situation of a distributor; it is even suggested in the Opinion that Olesen might have ceased to exist, but this standpoint is difficult to justify if, as was shown in the Decision, Olesen also distributed other fruit and vegetables and, indeed, sold more Dole than Chiquita bananas.

In the first positive statement of the implication of a refusal to supply the Advocate-General states that:-

"Refusal to sell to a long-standing customer, who cannot make any call upon suppliers other than the one with whom he has regular dealings, is an abuse prohibited by Article 86 in so far as it may affect trade between Member States".

This definition delimits the statement made by the Court in the Commercial Solvents case and is a major step in the clarification of the legal position.

However, the Advocate-General then proceeds to state that trade would be affected where a ripener/distributor may very well disappear from the market and the pattern of trade in a substantial part of the common market is appreciably modified thereby. Certainly, if the pattern of trade is modified, trade between Member States will be affected, but it is disputed whether a change in the structure of the market is an abuse per se. Could it not be argued that UBC's refusal to supply Olesen amounted to a discrimination prohibited by Article 86(c) since UBC did not cease supplies to other distributor/ripeners both in Denmark and elsewhere although they engaged in the same practices in Olesen.

It is also interesting to note that the Advocate-General states that if UBC had been justified in refusing to supply Olesen because it had participated in an advertising campaign for competing brands of bananas, this would mean that the undertaking would be entitled to enlarge the dominant position which it enjoyed and consequently to abuse it. Does this mean that the enlargement of a dominant position is per se an abuse or does it require some evidence of monopolization on the part of the dominant firm? In any event, does Article 86 extend to such behaviour or is it, as has been suggested above, neutral vis-a-vis the structure of the market itself, concerning itself only with market behaviour? Is this notion of abuse

sufficient to encompass the control of mergers and, if so, where is the legal justification for such an approach?

Unfortunately, Mr. Mayras does not expand on his statement and one is left to ponder the possibilities which are created.

The Court gave a detailed analysis of the nature of a refusal to sell in the context of an abuse of a dominant position. It noted that UBC had stated that Olesen had applied for preferential treatment compared with the seven other UBC distributor/ripeners in Denmark; when UBC refused, Olesen became the exclusive distributor/ripenener for Dole bananas. After 1973, when Standard Fruit announced that its Dole brand was going to oust Chiquita as the market leader, Olesen had sold consistently fewer and fewer Chiquita bananas and had pushed the sale of Dole bananas. According to UBC, it had taken less care when ripening Chiquita bananas than when ripening other brands so compromising UBC's high quality standards.

UBC maintained that it was absolutely justified in refusing to supply Olesen because of the fact that if a firm is directly attacked by its main competitor who has succeeded in making one of that firm's most important long standing customers his exclusive distributor for the whole of the country, that firm in its own interest and that of competition has no option but to fight back or else disappear from the national market.

As UBC's arguments differed substantially from those put forward by the Commission, the Court commenced its analysis by stating that:-

"an undertaking in a dominant position for the purpose of marketing a product - which cashes in on the reputation of a brand name known and valued by the consumers - cannot stop supplying a long standing customer who abides by regular commercial practice, if the orders placed by this customer are in no way out of the ordinary."

However, unlike the Advocate-General, the Court based its determination of such behaviour as abusive on the fact that it would be contrary to Article 86(b) and (c), since the refusal would limit markets to the prejudice of consumers and would amount to discrimination which might end the existence of a party on the market.

Whilst partially accepting UBC's argument that it was entitled to protect its commercial interests, notwithstanding the fact that it was in a dominant position, should they be attacked, and that such an undertaking was permitted to take steps to protect such interests, the Court stated that such behaviour could not be permitted if its true aim was to strengthen that dominant position and abuse it. A differentiation can be seen here with the view of the Advocate-General; whilst Mr. Mayras stated that the dominant firm could not enlarge its dominant position and thus abuse it, the Court seems to be implying that there is a distinction between strengthening a dominant position and abusing it; whilst both were dangers in a situation such as UBC's they were two separate dangers.

On balance, the Court considered that UBC's refusal to supply Olesen had been in excess of what could be considered as a reasonable sanction against Olesen in the circumstances.

However, the problem which faced UBC and will face every dominant firm in similar circumstances is how it can distinguish between protecting its own interests - which the Court has stated is permitted - and strengthening its position - which is not - since any repulsing of an attack from a competitor will almost certainly result in a strengthening of the dominant position. This is a tightrope which it would appear the dominant firm must walk without any indication of how wide the rope will be at any given point.

The other problem for the dominant firm raised in the UBC case is the degree of control and guidance which the dominant firm may exercise over its distributors in the market; must it stand idly by while competitors move in and sell through these same firms. The discussion in the earlier Sections of this Chapter would suggest that the dominant firm has at best only a limited degree of freedom in this matter and the United Brands judgment indicates that it has very restricted rights against such distributors should the latter not act in its best interests.

The Sugar Case<sup>33</sup> dealing with the behaviour of Pfeiffer & Langen on the German market seems to imply that a dominant firm is unable to prevent its distributors from dealing in competing goods - at least insofar as there are insufficient independent dealers on the market to satisfy the requirements of competitors wishing to enter the relevant market. Also in the Sugar Case the Court held to be abusive the action of a dominant firm which had 'expressly or impliedly told dealers or created an impression in their minds' that it would not supply them with sugar if they resold it for other than permitted purposes.

It is submitted that, whilst it is permissible to warn a dealer that he is in breach of his agreement, a threat of withdrawal of supplies, a reduction or an outright withdrawal of supplies will ultimately have to be justified to the Commission. The inherent difficulties in this can be seen from the United Brands Decision. The question can also be posed of whether the protection of a distributor will in all cases lead to the protection of the consumer. This may not necessarily be so.

The justification for the finding of abuse against UBC appears to be that UBC was using the withdrawal of supplies from Olesen as a deterrent to persuade other distributor/ripeners not to deal in the products of competitors of UBC; thus only firms which were totally dependent upon UBC would be permitted to remain on the market. However, the Court seems to be saying that small and medium-sized undertakings are entitled to give preference to competitors' goods should they judge such action to be in their best commercial interests.

In conclusion, the UBC case can be distinguished from the Commercial Solvents case<sup>34</sup> discussed supra; whereas in Commercial Solvents the party unable to obtain supplies was not, at the time of refusal, a contractual customer of the dominant firm, Olesen was in such a relationship with UBC. However in United Brands, the refusal to supply had less direct and immediate effects on the position of the dominant firm than in Commercial Solvents; in that latter case, Zoja was one of the only two large competitors of Commercial Solvents in the world, and the refusal seriously risked its continued operation on the market. UBC's refusal would, at worst, only have had indirect effects on UBC's competitors and there is certainly no suggestion that any of them was faced with elimination. Olesen the victim of the refusal undoubtedly suffered loss and damage, but even its elimination was an unlikely possibility. In any event it could possibly be argued that Olesen was partly to blame for what happened to it, and if UBC's assertions as to Olesen's loss were true, Olesen's loss would be that much less since it was dependent on UBC for less than half of its requirements of bananas at the time.

## Commission Oil Report

Before turning to the third case to be discussed here, that of BP<sup>35</sup>, mention will be made of the points relative to refusal to supply and Article 86 which were stated by the Commission in its 1975 report on the Behaviour of the Oil companies in the Community during the period from October 1973, to March 1974<sup>36</sup>, on which the BP case was based.

In the Oil Report, the Commission makes a number of assertions as to what is considered to be a collective dominant position held by the Oil Companies, which points have been considered in more detail elsewhere<sup>37</sup> and will not be repeated here. However, more importantly for our purpose, the Commission states that each of the Oil Companies had, during the Oil crisis, an independent dominant position vis-a-vis their traditional customers who had no access to suppliers other than those with whom they had done business. The Commission then proceeds to state that a refusal to supply such a customer can constitute an abuse forbidden by Article 86 because it would mean an appreciable change in the pattern of supply of oil products in a substantial part of the common market.

Several considerations arise from this statement; firstly what constitutes a 'traditional customer' - the Commission stated this to be anyone who had been a buyer in the previous twelve months, but this seems unduly extensive; secondly, the statement appears to be an extension of the notions put forward by the Court in the Commercial Solvents case quoted above - if this is the case, the statement can be seen as a logical development in the Commission's jurisprudence, albeit subject to a reservation as to what constitutes a traditional customer.

Turning then to the BP/ABG Decision in April, 1977, which arose out of the investigations which the Commission had carried out in the preparation of the Oil Report, the Commission considered the behaviour of seven major oil companies operating in the Netherlands at the time of the oil crisis, although it seems to have devoted most of its attention to BP.

As is well known, at the time of the crisis in November, 1973, there was uncertainty as to the volume of supplies which would be available and there was a shortage scare in most Member States. That month the Dutch government set up the Rijksbureau voor Aardolie Produkten (National oil products office) (RBAP) to organise and carry out the distribution of oil and petroleum products. In addition the RBAP acted as an intermediary when independent traders and buyers encountered supply difficulties.

The Decision followed out of a complaint by the Avia Group and by ABG (which was the purchasing agency for the Avia members in the Netherlands).

In normal times ABG required 15,000m<sup>3</sup> per month, and by regulation of 4th April, 1974, the Dutch Ministry of Economic Affairs ordered the nine companies refining in the Netherlands to supply ABG with 3,000m<sup>3</sup> per week - this took into account the Government recommendation that consumption be reduced to 80% to 85% of normal consumption. The RBAP had been dissolved on 1st April, 1974 and from that date ABG had found itself without supplies due to the behaviour of certain companies which were refusing to supply it.

At the time of the crisis, ABG's sales structure was as follows:-

- 49% through the AVIA network;
- 12% by other persons under binding contracts;
- 20% by regular, although non-contractual customers;
- 20% approx., by spot deliveries.

Until the crisis ABG had been assured of adequate supplies. Until 1968, BP had supplied ABG with oil on the basis of a short-term contract under which the two sides met annually to set the price, quantities and other terms. Thereafter supplies were no longer governed by fixed term contracts but by indefinite contracts, determinable by either party on six months' notice. When reorganising its business, BP terminated the agreement with ABG on 21st November, 1972, with six months' notice and it was agreed between BP and ABG that thereafter BP would make refining capacity available to ABG.

Thereafter, on the advice of inter alia the Dutch government ABG attempted to buy crude petroleum on the world market and have it refined. It seems, however, to have met with little success in this since, in August, 1973, it advised BP that it could not be assured of quantities of crude oil before September, and a second agreement was entered into with BP providing that the processing agreement would not enter into force until January, 1974. It was agreed that the 30,746m<sup>3</sup>, of oil which had been supplied by BP to ABG would be treated as an advance on processing for ABG.

Although there was no certainty as to whether ABG would be able to obtain crude petroleum to repay these advances BP continued to supply ABG with normal quantities.

During the 12 months immediately prior to the crisis, BP

supplied 81% of ABG's requirements, the next largest proportion being Gulf with 8%. During October, 1973, BP's share rose to 100% of ABG's needs.

With the advent of the crisis on 1st November, 1973, ABG's position changed dramatically. The Dutch authorities had, as has been mentioned above, recommended a reduction of 15% - 20% in consumption. BP reduced its deliveries to ABG even more. According to the Commission's figures, BP had reduced supplies to 'contractual' customers other than ABG by 13%; to non-contractual customers by 29%; and to ABG by 74%. The Commission argued that the trading relationship between BP and ABG had been very close in the year preceding the crisis; BP had supplied 80% of ABG's total motor spirit by way of an advance against the prospect of receiving quantities of crude oil which ABG was to deliver to BP's refineries. The Commission thus saw ABG as being one of BP's regular and long-standing customers whose supplies were being substantially reduced by its chief supplier.

These presumptions of the Commission are open to challenge on several counts; firstly, why do the Commission compare the situation of ABG with that of contractual customer; ABG was not a contractual customer of BP since its contract had been terminated in May, 1973; secondly, BP's willingness to supply ABG with motor spirit can be seen not as evidence of any special relationship but merely of a decision by BP to sell its current production of motor spirit (of which it must be remembered there was no shortage prior to the crisis) in return for future supplies of crude oil which ABG would obtain. Surely it is prudent business practice to sell a surplus of a product at the present time in order to ensure supplies

of a product in the future when there is always a possibility that such other product will then be in short supply; thirdly whilst BP may have supplied 80% of ABG's requirements, this was almost certainly due to ABG approaching it seeking supplies, rather than to BP seeking to corner ABG's business - after all ABG was free to seek its supplies anywhere.

It is based on these somewhat dubious premises that the Commission proceeds to condemn BP. Firstly it notes that the Dutch authorities had not made any distinction between contractual and non-contractual customers when they recommended a decrease of 20% in consumption. Thereafter it states that undertakings cannot rely on criteria based on the law of contract to prevent the realisation of the objectives of the Community's competition law, in particular, where their behaviour threatens the continuance of a system of free competition.

It states that, from the Community law point of view, it is the extent, regularity and continuity of commercial relationships which must be taken into consideration since any other basis would mean that the availability of supplies during a shortage could be influenced by dominant enterprises for artificial or arbitrary reasons. It does not, however, make it clear why it is these factors which must be considered. Whilst it is recognised that they are of relevance, it is not accepted that such factors are more important than an analysis of the legal basis on which such supplies are made. In a situation where two customers obtain the same proportion, or even the same quantity, of their requirements it is surely relevant that one does so on the basis of a long-term supply contract with the dominant firm whilst the other buys its requirements as and when

it needs them and takes advantages of the opportunities which are offered in several markets including the oil market to deal on the spot market at prices less than those charged to those with long-term supply contracts.

It is submitted that one of the characteristics of a long-term supply contract is that the purchaser gives up his freedom to deal on the spot market for at least part of his requirements and accepts prices at fixed levels or calculated in accordance with a set formula which may from time to time be higher than those prevailing on the spot market in return for the guarantee that such contracted-for supplies will be made available to him as they are needed - particularly in the case of a crisis or shortage of supplies. Surely the Commission cannot be arguing that such contractual customers be denied the benefits of their actions whilst still being subject to the rigours of being bound to the one supplier. If for no other reason such denial of contractual customers by the dominant firm could be the basis for an action for damages based on breach of contract - and possibly could be considered as a contravention of Article 86 (c) of the Treaty in that it would be treating dissimilar transactions (those with contractual and non-contractual customers) in the same fashion.

Having stated that no distinction should be made between contractual and non-contractual customers in allocating scarce supplies, the Commission then states that dominant firms can still take account of the peculiarities or differences which may exist in the commercial situation of their customers. In particular they are free to apply the prices and other conditions provided for in the supply contracts and to choose an appropriate reference period for

the period of constraint. Does it matter that one customer has a long-term supply contract whilst another purchases albeit similar quantities on the spot market from the dominant firm? According to the Commission it would appear not. Any difference in treatment of customers which results from such peculiarities ought to be objectively based and the dominant firm's choice may not have a discriminatory effect.

It is submitted that BP's treatment of ABG was based on objective criteria - ABG was not, at the time of the crisis, one of BP's contractual customers. Indeed it can be argued that in the period from April, 1973, when its contract with BP had come to an end, ABG was not a customer of BP at all; certainly BP was supplying it with quantities of motor spirit, but this was done on the basis that ABG would provide BP with crude oil which the latter would refine (ABG having no refining capacity of its own) and thereafter return it to ABG. In the event, ABG had difficulty in obtaining crude oil to enable it to fulfil its part of the bargain and BP made an advance to it on the understanding that ABG would repay such advance as soon as it was able to secure its crude oil supplies.

The Commission states that even if BP had grounds for treating contractual and non-contractual customers in different ways (which it had earlier stated it did not) it should have treated ABG without discrimination vis-a-vis its other non-contractual customers. The Commission did not consider that the advances made by BP to ABG justified a different treatment of ABG in comparison with other customers either contractual or non-contractual, having regard to the impossibility encountered by ABG in obtaining supplies elsewhere during the crisis.

Such conduct in the Commission's view, amounted to an abuse of a dominant position because it reduced supplies to ABG not only substantially but also to a proportionately greater extent than in relation to BP's other customers. BP had thus applied dissimilar conditions to ABG in imposing on the latter an obvious, immediate and substantial competitive disadvantage. That unfair behaviour could have jeopardised ABG's existence on the market and ABG was, moreover, a competitor of BP on the motor spirit distribution market.

These contentions are not acceptable; ABG was not a non-contractual customer of BP and accordingly its treatment cannot be compared with that afforded to persons in that group; ABG was in a unique category and as such was not treated differently from firms in similar circumstances. If BP had refused under its contract with ABG to supply ABG with motor spirit until the corresponding amounts of crude oil had been delivered to it by ABG, ABG would have received no supplies of oil at all from BP in the period between the termination of its supply contract with BP and the start of the oil crisis. In such circumstances, it would appear that BP would have been under an obligation to supply considerably less motor spirit to ABG than it was considered bound to do by the Commission, since it had made certain voluntary advances to ABG. Surely it is not the intention of the competition policy to penalise firms which behave in a manner more sympathetic than that which they are strictu sensu bound to do contractually.

Nevertheless, the Commission stated that:-

"It is abusive to treat a regular, long standing and substantial customer in a way which is clearly discriminatory by comparison with other customers."

This statement does not make it clear whether it is against similar customers which the treatment of the firm in question is to be judged or against all customers of whatever type. However, the Commission had stated earlier in the Decision that as a result of the oil crisis the oil companies had found themselves in a dominant position vis-a-vis their customers. This would appear to go even further and could include not only contractual and non-contractual but also occasional or indeed single-transaction customers.

In conclusion, the ratio to be drawn from the BP Decision is that a firm in a dominant position cannot, in a shortage situation, treat contractual and non-contractual customers in a different manner. In particular it cannot reduce the supplies which it makes to one party in a greater proportion than that applied to other customers. The BP Case can be seen not so much as a consideration of a refusal to supply in the same way as the Commercial Solvents<sup>38</sup> and United Brands cases<sup>39</sup> can, but it is more an investigation of how a refusal to supply, other than an absolute refusal to make any deliveries, can be considered as an abuse of a dominant position within the meaning of Article 86 (c) of the Treaty.

BP appealed to the Court for the annulment of the Decision, and in May/June 1978, the Court issued its judgment<sup>40</sup>.

The Advocate-General (Warner) examined the background to the dispute and noted that, according to BP, crude supplies had been available on the world market at the time ABG was due to provide crude oil to BP for processing, and BP agreed to make an advance of motor spirit on condition that ABG replace the crude before January, 1974. By the end of the period in which BP was due to supply such advance, ABG had not taken delivery of the whole amount because, as

ABG disclosed it had been able to obtain supplied from Gulf on the spot market cheaper than it could from BP under its agreement. During this period ABG also made substantial purchases from other oil companies; such transactions were stated not to be unusual for ABG. At the time BP did not know of the reason for ABG's shortfall in delivery orders and agreed to the balance of 41,500 m<sup>3</sup> being taken by ABG in October, 1973. This was why BP was shown in the Commission's enquiries as having supplied 100% of ABG's requirements in October, 1973.

When, at the end of October, the oil crisis arose, there was no arrangement of any kind between BP and ABG as to future supplies of motor spirit, although the draft of a further processing agreement had been discussed.

Mr. Warner then considered the role played by the RBAP in the crisis. It was noted that, as regards customers (including ABG) towards whom BP felt no particular obligation, BP considered that the responsibility for ensuring supplies lay with the RBAP. The RBAP set up a pool to help those customers who had difficulty in obtaining supplies. The nine major oil companies contributed to this pool in proportion of their share of the Dutch market - BP was called upon to contribute 9.7%.

ABG's normal requirements of motor spirit was approximately 15,000 m<sup>3</sup> per month. The RBAP decided that it should be supplied at the rate of 7,000 m<sup>3</sup> a month which would allow ABG to cover the needs of the AVIA network (which as mentioned in the Commission Decision was approximately 49% of ABG's sales) and of ABG's contractual customers (12% of sales), each reduced by 20% as recommended by the Minister. The RBAP took the view that it should be

directly responsible for supplying the needs of ABG's other customers. Although this approach was almost certainly suggested by BP Mr. Warner did not consider there to be anything sinister in ABG's largest supplier being consulted. It is postulated by the Advocate-General that this approach might not have been in conformity with the statement of the Minister of Economic Affairs that existing channels of distribution should be maintained - the approach would necessarily involve the possibility that such customers would be weaned away from ABG permanently. This possibility is not, however, further discussed.

In all events, ABG received 6,812m<sup>3</sup> of motor spirit in November, 1973 and 7,265 m<sup>3</sup> in December, - mostly from BP and Shell. During the same period ABG also bought substantial quantities from other unidentified companies bringing its total for November, and December, to 10,812 m<sup>3</sup> and 10,761 m<sup>3</sup> respectively. By the end of December, it appeared that ABG had no petrol left in stock at all. It was at this time that a complaint was made to the Commission.

In January, 1974, the RBAP drew up a fresh programme for supplies to ABG at the monthly rate of 7,000 m<sup>3</sup> per month. BP's shares of this was to be 3,500 m<sup>3</sup> per month. In the event, ABG received through the RBAP less than the 7,000 m<sup>3</sup> envisaged although part of this shortfall was due to a request from ABG to BP to defer deliveries. In the period January to March, ABG was also able to purchase supplies from other companies to supply 3000 m<sup>3</sup> a week to ABG. Such deliveries were to be made in the proportion in which each company sold motor spirit in the Netherlands other than under

their own brand name. As a result of this BP's obligations to deliver were reduced.

Having outlined the facts of the case, as expanded during the proceedings, Mr. Warner then proceeded to examine the facts in the light of Article 86.

He considered that the task of allocating supplies during a crisis was primarily one for government - whether it be national or Community (Council Directive No. 73/238/EEC of 24th July, 1973 related to measures to mitigate the effects of difficulties in the supply of crude oil and petroleum products).

Mr. Warner noted that government could ensure continuity of supplies either voluntarily (as through the RBAP) or by compulsion (as by Ministerial Order); the only difference in the oil case was that between 7,000 m<sup>3</sup> per month and 3,000 m<sup>3</sup> per week. Even if the approach of the Dutch government indicated a lacuna in the measures, Mr. Warner did not consider that it was a lacuna of the type which Article 86 was designed to fill.

Taking as his starting point the statement of the Commission in the United Brands case that a dominant position was one in which the firm in question might conduct its business 'without regard for the reactions of competitors and customers', Mr. Warner stated that, in a situation of crisis such as the oil crisis of 1973, a trader could not distribute his product without regard to the attitude of his customers - after the emergency was over such customers would remember how they had been treated by the dominant firm during the period of scarcity.

The Advocate-General seems to accept BP's arguments that

contractual customers would expect to receive the favourable treatment to which their contracts entitled them, whilst non-contractual customers would expect the loyalty which they had shown in normal competitive times to be repaid by loyalty to them by the dominant firm during a shortage. A firm could only ignore such considerations at the peril of losing its customers once the crisis was over.

As a result of this factor, the Advocate-General did not consider that such a firm was, during the emergency, in a dominant position as that expression was used in Article 86.

Even if Article 86 was held to be applicable in such a situation Mr. Warner did not see any rule express or implicit which suppliers in such a position were expected to observe. Mr. Warner stated expressly that Article 86(c) is not applicable in considering the action of a dominant firm in deciding who to supply and the quantities to be allocated to each. Although he considered that a denial of supplies could be an abuse of a dominant position, it did not fall under paragraph (c). He considered that the Commission definition that:-

"abuse within the meaning of Article 86 of the Treaty may be defined as any action by an undertaking in a dominant position which reduces supplies to comparable purchasers in different ways without objective justification"

was deficient because it did not answer the question of what were 'comparable purchasers' nor what was 'objective justification'. The following paragraphs of the Commission Decision which were meant to provide a basis on which the dominant firm calculated the supplies which it was bound to make were not considered to aid this problem.

In Mr. Warner's opinion, with which the author could concur, such a rule, which was manifestly not expressed in Article 86, could only be implied by that Article if it were equitable, practicable and generally accepted. In this instance he considered the rule to be none of these things; it was not equitable because it ignored the special claims of a supplier's contractual and regular customers; it was impracticable because a supplier would never know when it should be applied. It is seldom possible at the start of a crisis to determine that its duration or intensity is likely to be. In this respect, one of the mitigating factors which led the Commission not to impose a fine was that 'the confusion which reigned on the Dutch petroleum market, because of the uncertainty as to how the crisis might develop, made it difficult to assess the reductions in delivery that were needed'; that the rule was not generally accepted could be deduced from the very facts of the case. The difference in the approaches used by the RBAP and the Minister for Economic Affairs showed that there was no generally accepted rule as to allocation of supplies in a shortage.

For all these reasons, Mr. Warner considered that the case fell outwith the scope of Article 86 but, in the event that the Court did not agree, he considered whether there had been any abuse by BP of a dominant position, should it be found to possess one.

Mr. Warner noted the position vis-a-vis the RBAP and considered that in view of the doubts which had been created on the part of BP as a result of its advance of motor spirit to ABG and its supply, albeit indirectly, to ABG through the RBAP (which doubts had been recognised by the Commission in its Decision) it was reasonable for

BP to have taken the view which it did. Accordingly, even if BP did possess a dominant position, it could not be held to have abused that position.

The Court agreed that, at the time of the crisis, ABG was no more than an occasional customer of BP, and rejected the Commission's argument of applying reductions in supply to ABG on the basis of the previous year's deliveries. Whilst it was explicable where the relationship between seller and customer had continued unaltered during the previous year, such a principle was untenable where the supplier had, during that period, ceased to carry on such relations with its customer.

In the particular case, the Court considered that the fact that ABG had been supplied on a continuous basis by BP by way of advance of motor spirit could not serve as a valid argument to compare ABG's position with that of a traditional customer of BP during the relevant reference period. For that reason, and since ABG was only an occasional customer of BP for several months before the crisis, BP could not be accused of having applied to ABG during the crisis less favourable treatment than that it reserved for its traditional customers.

The Court stated that had BP treated ABG the same as its contractual customers, it would have resulted in a considerable diminution of the deliveries which those customers expected. A duty to supply both contractual and non-contractual customers in the same fashion during a period of crisis could, in the Court's view, only stem from measures adopted within the framework of the Treaty, in particular Article 103, or in the absence of Community measures, from measures adopted by the national authorities.

In view of the stance adopted firstly by the RBAP and latterly by the Minister of Economic Affairs, ABG was able during the crisis to find supplies sufficient to enable it to overcome the difficulties created by the crisis.

Consequently, the Court was able to state that it did not appear that BP had abused a dominant position within the meaning of Article 86 and it therefore annulled the Commission Decision.

Although the Court stated ultimately that there was no abuse of a dominant position it did not deal with the question of whether or not such a position existed. As will be recalled Mr. Warner considered that there was no dominant position but the Court started with the premise that if there was a dominant position was there any evidence that it had been abused. Presumably this approach was determined by the Court deciding that there was no abuse and consequently it did not require to consider the more difficult question of determining whether there existed such a position in the first place.

The result of the BP judgment is that it appears clear that, at least in the particular circumstances of the oil crisis, there is no doctrine of a public utility regulation in a situation of shortage. There is no doubt that Article 86 does not require a dominant firm to ignore its contractual obligations in order to distribute supplies equally between all its customers.

For the purposes of this study, it is difficult to draw out any ratio in the same way as was done in the Commercial Solvents and United Brands cases. However, the one factor to come out of the case, other than that relating to supply obligations in a crisis, is

that in certain circumstances, a refusal to supply may contravene Article 86 (c) if it results in similar customers being treated differently. However, paragraph (c) will not automatically have a role to play and its application will require to be determined individually in each particular case.

#### Hugin/Liptons

The next case to be considered is that of Hugin/Liptons in December, 1977<sup>42</sup>. The first point to be remembered about the Decision is that it was taken after the BP Decision<sup>43</sup> but before the Court had given its judgment in that case<sup>44</sup>.

Hugin AB is a Swedish manufacturer of cash registers and similar equipment. Within the EEC it has a market share of approximately 12%, although it has a monopoly in the supply of spare parts for its machines since these are made to its designs and with its tools and through its own sales network.

Liptons is a small London based company specialising in business machines, particularly cash registers. It services, repairs, reconditions, sells and rents out cash registers of most types and has therefore acquired considerable experience and expertise in this field.

Liptons first started purchasing Hugin spare parts from the importer of Hugin cash registers in the late 1950's. In 1969 Liptons was appointed the 'main agent' to sell Hugin cash registers in England, Scotland and Wales with the right during the initial period of such agency to service and maintain Hugin machines. Under the agreement Hugin GB agreed to sell to Liptons cash registers for sale within the agreed territory. Liptons continued to purchase

Hugin cash registers and spare parts for its own use until early 1972. Thereafter it continued to obtain its supplies from the newly created Hugin subsidiary Hugin Cash Registers Limited ("Hugin UK") until October, 1972, when supplies ceased following the termination of the agreement in May 1972.

Hugin UK stated that they did not supply independent firms in the UK and Liptons knew of no such firm dealing in the repair and maintenance of Hugin cash registers. Accordingly, Liptons appeared to be Hugin UK's only competitor in the United Kingdom.

The Decision narrates the association between Liptons and Hugin from which it appears that the agreement between Hugin GB (which was not a subsidiary of Hugin AB) and Liptons was not included in the assets and liabilities of Hugin GB which were taken over by Hugin UK in January 1972. Liptons, however, was not informed of this until April, 1972 when Hugin UK offered it a new distributorship agreement. This was refused by Liptons on the basis that it was less wide in scope than the previous agreement with Hugin GB. On 26th May, therefore, Hugin GB repudiated its agreement with Liptons.

From 23rd October, 1972, Hugin UK refused to supply Liptons with any spare parts, other than those of a minor nature not related to repair or maintenance and which the dealer could fit himself. Thereafter Liptons attempted to obtain supplies from sources in other countries but without success. Hugin AB and its subsidiaries in other Member States all referred Liptons to Hugin UK.

This refusal, Hugin UK sought to justify on the basis that it had to protect its customers and ensure that maintenance was only done by competently trained staff. Under no circumstances, would

Hugin permit the sale of spare parts to independent companies outwith the Hugin distribution network which might wish to service, maintain, repair or re-condition such machines anywhere in the common market.

In its reply to the Commission's statement of objections, Hugin stated that it had never been engaged in the sale of spare parts for cash registers as a product distinct from cash registers; spare parts were an integral part of service and maintenance; there had never been a demand for spare parts distinct from that required in maintenance service; and stocks of spare parts were limited to the expected needs under guarantees, contracts and service arrangements. Liptons according to Hugin AB, had not had the necessary training nor access to manuals and other technical information for several years and was not capable of providing reliable services and repair on Hugin machines in the United Kingdom. Although Hugin had maintained that development in the market was very rapid, it conceded at the Commission hearing that it was still supplying the same machines (with one exception) in 1977 as it had done in 1972 although there were certain differences due to technical development. It agreed that its machines were of the same technical complexity as those of its competitors.

As a result of the refusal to supply, Liptons could not continue in business servicing, maintaining and repairing Hugin machines. It had invested a large amount in Hugin machines which it had rented out and could no longer offer the after-sales service which its customers required of it. The percentage of Liptons' income attributable to the rental of Hugin machines fell from 62% in

1970 to 6% in 1975. For an interim period Liptons had dismantled Hugin cash registers which it had had in stock in order to provide spares for its rental business but this was an uneconomical practice and as a result Liptons ceased to be able to trade in second hand Hugin machines.

It was stated by Liptons, and not disputed by Hugin, that it was competent to undertake all necessary work on Hugin machines in 1972 and Liptons maintained that it was still capable and qualified to undertake such work at the time of the refusal to supply.

For these reasons the Commission determined that Hugin had a dominant position in the market for spare parts for Hugin cash registers. Such a position had been abused by Hugin by its refusal to supply an existing substantial customer for and user of the products thereby eliminating that supplier from the market and by its prohibiting its subsidiaries and dealers from supplying those products outside its distribution network, thereby making the refusal to supply more effective by denying those products to the customers and users in question. Such an abuse was likely to strengthen and consolidate Hugin's already dominant position on the market. The reason put forward by Hugin as a justification for its refusal was not considered by the Commission to be sufficient; even if Hugin cash registers had been of such complexity as to require special training beyond that needed for similar products, in view of the evidence available, the Commission was not satisfied that at the relevant time Liptons did not possess such expertise. Hugin could not rely on the fact that Liptons might have lost such expertise during the period since Hugin's refusal since such loss would be the direct result of Hugin's action.

Hugin appealed to the Court<sup>45</sup>.

In his Opinion, Advocate-General Reischl first considered the existence of a dominant position and decided that there existed a separate market in spare parts for cash registers, drawing support from a Decision of the German Bundesgerichtshof in October, 1972 which also dealt with cash registers. On this market Hugin had a dominant position. Turning then to the question of abuse, Mr. Reischl stated that the mere fact that Liptons ceased to be authorised Hugin distributor in 1972 could not constitute a valid reason for the refusal to supply.

The Advocate-General noted that reference to Article 86 was justified in his opinion when an undertaking in a dominant position makes use of that position in order to eliminate what is in practice the only important competitor on a secondary market and thus to monopolise the second, related market. In his view, that would constitute a forbidden alteration to the competitive structure by the strengthening of a dominant position. With respect to Mr. Reischl, the author would submit that the mere strengthening of a dominant position is not prohibited by Article 86 per se; what is required is some positive attempt to exploit the dominant position abusively to the detriment of competitors, customers and suppliers.

It is however, interesting to note that reference is also made to such behaviour being prohibited in terms of Article 86 (b) and Article 85(1)(e) in that customers for spare parts are also required to allow Hugin to provide maintenance for their cash registers. The reference to Article 85(1)(e) is an interesting one as it is the first time that the possibility of an attempt by a dominant

firm to extend its dominance into another economic sector has been considered as falling within the reach of Article 85(1). The approach is not confirmed or rejected by the Court in its judgment and must, therefore, remain open to discussion.

Mr. Reischl proceeds to make certain wide-reaching statements as to the position of a dominant firm on the market and the duties owed thereby. Firstly he notes that a dominant firm cannot rely on the argument that the secondary market (in this case of servicing of machines) is of merely minor importance and that, therefore, its action will have no significant detrimental effects on competition. Although in his Opinion in the Hoffmann-La Roche/Vitamins case<sup>46</sup>, he had pointed out the theory of 'perceptibility' of detrimental effect with regard to Article 85, Mr. Reischl did not consider that such a theory would extend to Article 86. It would be illogical to apply such a doctrine to a market on which competition is already seriously restricted by the existence of the dominant position; to state otherwise would be to permit the dominant firm to behave as it chose and to exclude small undertakings on the basis that they only accounted for a small share of competition.

The Advocate-General also criticised Hugin for only having regard to existing competitors and their turnover -- he argues that regard should be had to the extent of the whole of the relevant market; that is Hugin's turnover in spare parts and after sales service. If this is done it can readily be seen that the exclusion of independent firms from this field of activity (in which they might obtain a larger share in the future) is hardly irrelevant for the purposes of competition law.

This point is of great importance -- in none of the previously discussed cases had there been any concern had for persons other than existing customers of a dominant firm -- here it seems to be being suggested that potential future competition should be taken into account in considering the behaviour of a dominant firm. Indeed, although there has been no formal Decision or judgment on the point, the author understands the Commission attitude to be that a dominant firm has an obligation to supply not only its existing contractual and non-contractual customers but also occasional and irregular customers and even persons with whom the dominant firm has never dealt but who approach it seeking supplies. This approach is believed to be required even where the whole production capacity of the dominant firm is committed to contractual customers if it holds a virtual monopoly for the goods in question.

If this Commission view is indeed the law, it is difficult to see how a dominant firm can avoid transgressing the prohibition of Article 86 if it carries on any coherent form of sales and marketing policy. It must surely have some discretion as to the persons with whom it will deal; to state otherwise would be to impose a public utility regulation on dominant firms within the Community without, it is submitted, there being any legal basis in the Treaty for such an approach.

However, having established that Hugin possessed a dominant position on the relevant market and had abused that position by its conduct towards Liptons, the Advocate-General decided that trade between Member States had not been affected and, accordingly, recommended that the Decision be annulled. It should be particularly noted that this determination rested solely on the unique facts

of this particular case and cannot be seen as a potential escape clause for dominant firms. The nature of the relevant market made it impossible for Liptons to deal other than in the United Kingdom and there was no question of its being engaged in any export activity.

The Court did not consider the question of abuse, although it did decide that Hugin held a dominant position on the market for spare parts for Hugin cash registers. Having decided that Hugin's behaviour towards Liptons and the latter's dealings on the relevant market did not affect trade between Member States, it was not necessary to cover the more thorny question of abuse.

The conclusion which can be drawn from the Hugin/Liptons case appears to be that a refusal to supply by a dominant firm in respect of spare parts may be an abuse where that refusal is generalised and extends to all supplies outwith the dominant firm's distribution network. All the cases discussed in this Part of Chapter 4 have been concerned with a refusal to supply an existing customer of a dominant firm. This has been so because the Court and the Commission have been primarily concerned with protecting the interests of existing traders and preventing dominant firms from consolidating their market position at the expense of small and medium-sized firms such as Liptons, Zoja, Olesen or ABG. If the true aim of Article 86 is to protect the interests of consumers as a whole, it is suggested that it is only a logical extension to that notion to state that the supply obligation would extend to new customers.

As was mentioned, *supra*, in relation to the comments by Advocate-General Reischl in the Hugin/Liptons case<sup>47</sup>, such an idea has merely been hinted at *obiter* and has never formed the basis of any legal determination.

In the Oil Report, in 1974<sup>48</sup>, the Commission queried whether in a crisis such as existed on the oil market in 1973, the oil companies whom the Commission saw as possessing a collective dominant position on the market should be obliged to supply buyers who, prior to the crisis, obtained their requirements from other sources. This point was never answered in the subsequent Decision against BP<sup>49</sup> and remains open to doubt. In any event, it appears to be derived from a different legal standpoint from that postulated in relation to the Hugin case. The point in the Oil Report appears to be that such an obligation would be necessary to maintain the competitive structure which existed prior to the crisis. If such is the aim of Article 86, then, it is submitted, there can be no question of an obligation to supply a new customer since, per definitionem, that would result in a change in the competitive structure of the market.

It still remains to be determined whether a refusal to supply a new customer who requests supplies for the first time may be an abuse prohibited by Article 86.

In this respect, the author would criticise any attempt to extend to dominant firms in the private sector of the economy any form of public utility regulation on the basis that such a control is outwith the framework provided for in the Treaty and, in any event, presupposes an economic system other than that of free enterprise which appears to be at the root of the Community system of free competition.

In conclusion, the position with regard to refusal to supply may be summarised as follows:-

- a) A refusal to supply may constitute an abuse prohibited by Article 86 where:-
  1. the dominant firm is a monopoly and the refusal applies to one of the principal users, previously a customer; or

2. the refusal is to a long-standing customer who cannot make any call upon any supplier other than the one with whom he has had regular dealings; or
3. the refusal is to a regular, long-standing and substantial customer and is of such a type as to be clearly discriminatory by comparison with other customers; or
4. the refusal reduces supplies to comparable purchasers in different ways;

and there is no objective justification for such refusal.

- b) It remains unclear whether there is any obligation of supply vis-a-vis new customers.

## II. JUSTIFICATION FOR A REFUSAL TO SUPPLY

The first Part of this Section discussed the various cases in which either the Court or the Commission had condemned the refusal to supply by a dominant firm as an abuse of a dominant position within the meaning of Article 86; however it should not be assumed that all refusals to supply by such an enterprise will, per se, amount to a practice prohibited by that Article. Indeed, there are instances where such a refusal would be permitted and, it is submitted, could not be prohibited without seriously damaging the economic framework of the market as a whole.

Unfortunately, neither the Court nor the Commission has stated expressly what types of refusals they would see as justified and this analysis must therefore rest on various statements made obiter by the Commission, the Court or the Advocate-General. It is necessary, therefore, to examine the various pieces of jurisprudence to discover which refusals could be justifiable.

In *Commercial Solvents*, in 1972<sup>50</sup>, Advocate-General Warner queried whether it would be an abuse for a dominant firm in a market for a raw material to refuse to supply a particular user of the raw

material, if that raw material was itself a manufactured product which existed only because of the efforts of the dominant undertaking in research and development and the dominant firm had decided not to sell the product to anyone but had itself met all demand for the end product derived therefrom. In the event, the Advocate-General was satisfied that neither Commercial Solvents Corporation nor its Italian subsidiary, Istituto Chemioterapico Italiano, were able to satisfy this test as there was evidence that CSC had supplied another Italian manufacturer whilst it refused to supply Zoja. The Court did not make any comments on Mr. Warner's statement which must, therefore, remain a possible justification for a refusal to supply. Such an approach would, of course, assume that there was no legal obligation of the public utility type imposed upon a firm in a dominant position in respect of products for which it has a dominant position (or as in the case of CSC a world monopoly). This justification seems somewhat devalued, however, by the views expressed by the Commission in its later Decisions, notably that against BP. Although that Decision was subsequently annulled by the Court, it must be considered as representing at least one line of Commission opinion.

In United Brands, in 1978<sup>51</sup>, the Company argued that its refusal to supply Olesen was partly motivated by that firm's poor financial situation and its unsatisfactory performance as a distributor. Although the Court did not mention these points, as they may not have been adequately substantiated, nevertheless they remain a possible justification. If the reasons for refusing supplies to Olesen were indeed as stated by UBC they seem to be reasonable.

There is no evidence as to Olesen's financial situation, but it does not appear improper for a firm, even a dominant firm, to warn a distributor that it is providing an unsatisfactory service which, if not improved will result in supplies being terminated. The problems of controlling distributors of a dominant firm have been discussed in Section A, supra, and reference is made thereto.

In the UBC Case, Advocate-General Mayras implies that it might not be abusive to refuse to supply a long-standing customer if that customer were able to call upon other suppliers to meet his requirements. This would require that the dominant firm which is the subject of the proceedings did not hold a monopolistic position, that the product concerned was homogeneous and that there existed a number of other firms on the market each capable and willing to supply the customer in question with the same quantity of the product on similar terms. If the dominant firm is using the refusal as a method of controlling the behaviour, and particularly the loyalty, of its customers it is improbable that such circumstances would arise. There is clearly no point in a dominant firm seeking to refuse to supply a customer whom it is able to supply if there are other firms capable of fulfilling the order; such a refusal would only be to increase competitors' market shares at the expense of its own.

In the same case, the Court implies that a dominant firm could cease supplying a particular customer - even a long-standing one - if that customer did not abide by regular commercial practice and did not place orders which were not 'abnormal'. Although the Court does not elucidate on what it meant by 'abnormal' orders, the

Report on the OECD in 1969 on Refusal to Sell defines those as including orders for derisory quantities, unusual delivery arrangements, or lack of appropriate qualifications or installations. The determination of whether or not any of these possible 'abnormalities' exist in a given case will, of course be a question of fact, and it is important, if this justification is to succeed, that the dominant firm exercises its rights in an objective a fashion as is possible in the circumstances.

The BP Case<sup>52</sup>, and Decision which was annulled<sup>53</sup>, imply that a refusal will not be prohibited per se if it is not discriminatory vis-a-vis similar customers. Equally the Commission Decision makes it clear that it is the fact that there is no objective justification for the refusal that brings the behaviour of the dominant firm within the ambit of Article 86. Thus, if there were an objective justification, it is possible that the refusal would be acceptable.

It seems to be suggested in Hugin/Liptons<sup>54</sup> that if a customer appears - presumably on an objective test - to lack the appropriate skill, expertise, training, experience and facilities to carry out the work for which spare parts were purchased, this would be a valid reason for the producer of such spare parts refusing to supply them. In this instance what has to be weighed up is the detrimental effect on competition as against the possible detriment to consumers and to the reputation of the dominant supplier of the product for which the spare parts were manufactured.

Presumably, other valid reasons for refusal to supply exist and provided that these are the result of objective tests designed to

protect the commercial interests of the supplier, it is difficult to envisage their prohibition in terms of Article 86. Obvious instances of such reasons would be lack of credit worthiness, a decision on the part of the dominant firm to pull out of that particular market - with the caveat of the CSC/ICI Decision<sup>55</sup>, and unsatisfactory performance as a distributor - subject to the United Brands case<sup>56</sup>. It may also be that a decision by the dominant firm to streamline its distribution system would justify a refusal to supply, but the Hugin/Liptons Decision of the Commission must cast doubts on this.

In conclusion, it may be stated that, for there to be any possibility that a refusal to supply by a dominant firm will escape the prohibition of Article 86, it is essential that the refusal be made for objective reasons, that it be made in a non-discriminatory fashion vis-a-vis other customers and that it be made on the basis of known criteria. There is also possibly more likelihood of justification if the customer refused is not long-standing or regular; however, the position of occasional and new customers is far from clear.

For the dominant firm, and its legal advisers, the best approach would appear to be one of extreme caution and, indeed, it is advisable for the dominant firm to have considered how or whether it will remove a customer or distributor at a later stage before contractual arrangements are entered into; if the consideration is left to the time when the removal is desired or the refusal to supply effected, there is a great likelihood that the action will be condemned under Article 86.

### III REMEDIES AVAILABLE AGAINST A REFUSAL TO SUPPLY

The problem of how the supervisory authorities are to deal with a refusal to supply which has been found abusive is a particularly difficult one. Unlike other contraventions of the competition rules, mere 'cease and desist' type orders will not be sufficient to remedy the situation. Whereas a breach of Article 85(1) or of other types of abusive practices under Article 86 may be remedied by the Commission taking a Decision ordering that the agreement, decision or concerted practice be terminated, or that the dominant firm cease the abusive behaviour complained of, the remedy against a refusal to supply will necessarily involve some form of positive order being made directing the dominant supplier to continue or to resume supplies to the affected customer or customers.

It is not sufficient, it is submitted, for the Commission or the Court merely to instruct the dominant firm to make supplies available; some more detailed control of such supplies is essential to prevent the dominant firm avoiding the sanction by engaging in some other type of behaviour.

It is from this basis that the jurisprudence dealing with the question of a refusal to supply will be considered.

In the Commercial Solvents Decision in 1972<sup>57</sup>, the Commission ordered CSC and ICI to bring to an end the infringement of Article 86 resulting from its refusal to supply Zoja and in particular:-

"(a) to supply at once to Zoja 60,000 kg of 1-nitropropane or 30,000 kg of aminobutanol at a price no higher than the maximum price that they charged for those products; and  
(b) to submit within two months for the approval of the Commission proposals for the subsequent supply of Zoja".

Soon after the issue of the Decision, CSC complied, albeit under

protest with the requirement of paragraph (a) above but at the time that they lodged the appeal with the Court Registry for annulment of the Decision they applied for a stay of execution insofar as the future supply of Zoja was concerned<sup>58</sup>.

By Order dated 14th March, 1973, the President of the Court ordered that the time limit for the submission of such proposals be extended until 2nd April, 1973, and on 10th April, 1973, a contract was entered into between CSC and Zoja for the supply of aminobutanol to Zoja for a period of two years commencing 1st January, 1973 and thereafter from year to year until terminated by either party. Zoja expressed itself satisfied with the terms of such contract and the Commission confirmed that it met the requirements of the Decision.

In his Opinion, Advocate-General Warner took the opportunity of examining the whole question of the Commission's competence to impose specific supply requirements on CSC and ICI in respect of Zoja. The applicants had argued that such an order could only be founded upon a Regulation enacted by virtue of Article 87 of the Treaty and could not rest on Article 3 (1) of Regulation 17. This argument was rejected by Mr. Warner who stated that Article 3 (1) of Regulation 17 was not confined to the making of 'cease and desist' orders in general terms.

Article 3 (1) of Regulation 17 states :-

"Where the Commission, upon application or upon its own initiative, finds that there is an infringement of Article 85 or Article 86 of the Treaty, it may by Decision require the undertakings or associations of undertakings concerned to bring such infringement to an end".

In arguing that such provision permitted the Commission to impose

specific requirements, Mr. Warner drew attention to the provisions of Article 3 (3) of the Regulation which provide that :-

"Without prejudice to the other provisions of this Regulation, the Commission may, before taking a Decision under paragraph (1), address to the undertaking or associations of undertakings concerned recommendations for the termination of the infringement."

Mr. Warner stated that, in his view, the recommendations which were to be made under paragraph (3) must be specific; it was therefore illogical if specific recommendations under paragraph (3) could not be followed up, where appropriate, with specific requirements under paragraph (1). In its pleadings before the Court, the Commission had maintained that the reason why Article 3 (1) was left in such general terms was because it would have been impossible for the draftsman to have foreseen every eventuality for which a sanction would be required and to list such measures in the Regulation. Such an argument is one which it is correct to accept.

Finally, in this context Mr. Warner noted that it was in general unfair to a defendant to make an order against him requiring him to do something positive without specifying in the order precisely what he must do in order to comply with it. In the case being examined, if the Commission had made a general order it would have been to the effect that CSC and ICI were to resume supplies to Zoja; but it would not have told them what quantities were to be made available nor the terms - particularly the prices - on which such supplies were to be made in order to comply with the order. Since there was a periodic penalty being imposed at the rate of 1000 ua per day until the Decision was complied with, such a general order would have placed them in an intolerable position. The Advocate-General did not consider that such was the intention of the

drafters of Regulation 17.

Mr. Warner then proceeded to examine whether the power contained in Article 3 (1) of Regulation 17 had been properly exercised by the Commission. In his view since an abuse of a dominant position is an infringement of Article 86 only 'insofar as it may affect trade between Member States', it follows that the Commission only has power to order the defendant companies to resume supplies insofar as the cessation of such supplies might affect trade between Member States. As a matter of fact the applicants argued that not more than 10% of Zoja's sales were made within the common market, and accordingly that the Commission should not have ordered them to supply more raw materials than was necessary to maintain this trade in the EEC. Indeed, throughout the proceedings CSC/ICI had repeatedly offered to supply Zoja enough aminobutanol for this purpose but their offers had been rejected by the Commission.

In the Advocate-General's opinion, the Commission Decision had not been adequately reasoned in terms of Article 190 of the Treaty since the resumption of supply obligation did not adequately state the reasons on which it was based. However, in its statement of Defence, the Commission stated that the quantity to be supplied could not be based on a distinction between the actual sales of Zoja destined for the common market and those for elsewhere because this would ignore the necessity of guaranteeing the maintenance of Zoja as a viable undertaking; this was because a large decrease in Zoja's turnover could not occur without seriously affecting its competitiveness.

Mr. Warner accepted that it could be urged in any case that the export trade was essential for the maintenance of the home trade

and vice versa because the loss of either would result in such a loss of economies of scale as to make the undertaking uncompetitive in the remaining market. However, he considered, correctly in the author's opinion, that had the Commission found such to be the case, it should have said so expressly in its Decision. The absence of such reasoning, in the Advocate-General's opinion made the order unlawful and it should therefore be annulled were it not for the fact that it had already been complied with by CSC/ICI and the Court could not abrogate the rights which Zoja had acquired thereby.

In its judgment the Court accepted that the Commission had power in terms of Article 3 (1) of Regulation 17 to make the order which it had done, but it disagreed with the Advocate-General's views as to the adequacy of the reasoning on which the order was based and therefore rejected the applicant's submissions. The Court considered that the Commission had consistently maintained that the conduct complained of aimed at eliminating one of CSC's principal competitors within the common market. In the Court's view, the measures taken were justified by the necessity of preventing the conduct of CSC and ICI having the effect referred to and eliminating Zoja as one of the principal manufacturers of ethambutol in the Community. This reason was seen by the Court as being at the root of the litigation and could not therefore be considered as insufficient.

The CSC-ICI case illustrates the problem with which the control authorities are faced. Although the Court ultimately ratified the actings of the Commission, it can be argued that the outcome might have been different, as Mr. Warner suggested, had it not been for the fact that the order in the Decision had already been complied

with. The Advocate-General's Opinion does, however, illustrate the necessity of a large amount of detailed reasoning before the Commission makes a positive requirements order of the type made against CSC/ICI. This degree of reasoning will itself pose a major problem for the Commission in that it requires a degree of knowledge of the undertakings involved and their relative business affairs greater than that which will be readily ascertainable by the Commission's staff. It is for this reason that the author would expect orders of this type to be made infrequently and only when there is no other possible method of ensuring compliance with the Community's antitrust policy.

In United Brands, the company put an end to the refusal to supply without the Commission formally ordering it to do so and before the Commission had taken the formal Decision finding the refusal to supply Olesen to be an infringement of Article 86<sup>59</sup>.

In Hugin/Liptons in December, 1977<sup>60</sup> the Commission, acting by virtue of Article 3 (1) of Regulation 17, stated that it required Hugin AB to bring its infringement of Articles 85 and 86 to an end without delay. Providing details of how this infringement was to be remedied, the Commission stated that it considered that :-

"Hugin UK should take immediate steps to ensure that supplies of Hugin spare parts are resumed to Liptons in respect of its needs in the short term and also, in order to ensure the maintenance of effective competitive conditions, that Liptons should receive in the long term sufficient supplies of available spare parts to meet its reasonably foreseeable requirements".

"The price for such spare parts should be an appropriate market price between that which is currently charged by Hugin AB to Hugin UK and that which is currently charged by Hugin UK to end users in the United Kingdom and which allow to Hugin UK

an adequate margin of profit and to Liptons a reasonable trade discount".

In addition, the Commission imposed a periodic penalty on Hugin for each day of delay in the submission of proposals for approval by the Commission in respect of the resumption of supplies of spare parts to Liptons after a period of one month after notification of the Decision.

Hugin appealed for the annulment of the Decision<sup>61</sup>.

In its judgment and in the Opinion of the Advocate-General, the Court stated that trade between Member States had not been affected and, accordingly, there could be no question of an infringement of Article 86. The Decision as a whole, including the supply obligation, was annulled therefore.

It is interesting to note that when it lodged its application before the Court, Hugin did not apply for the suspension of the operative part of the Decision until the case had been decided, but, instead, complied with the obligation imposed on it. On 3rd January, 1978 it informed the Commission that it was prepared to supply spare parts to Liptons. At the same time it asked for a list of Liptons urgent requirements for five months to be sent to it. In the subsequent months, however, it received only very small orders from Liptons.

The reason for Liptons' behaviour is difficult to see; if it were as short of essential Hugin spare parts as it had maintained and really needed such parts to continue the servicing of its existing Hugin rental machines, why did it not take the opportunity to replenish such supplies. It is probable from the figures quoted in the case, however, that Liptons' withdrawal from the Hugin market

had resulted in its requiring fewer spare parts than were needed at the time the refusal first occurred.

Although there is no mention of subsequent events in the case report, presumably Hugin withdrew its offer of spare parts when the Court annulled the Commission Decision ordering such supplies to be made.

In conclusion, it appears that the only remedy open to the Commission is an express order contained in its Decision, properly and thoroughly reasoned in accordance with Article 190, requiring the dominant firm to resume supplies of a specific quantity of the product concerned and specifying in some detail the terms and conditions on which such supply is to be made. Whether or not the Commission have the necessary expertise to carry such a procedure through to a successful conclusion in more than a very limited number of cases is open to grave doubt, particularly since some form of continuing supervision or attention would be required. By its very nature such a control involves a policy shift towards dominant firms akin to that of a public utility system; whether or not the Community are to embark upon such an approach is a problem which requires to be resolved at a political level rather than at a legal level, although it will inevitably fall upon the lawyers to transpose the political will into legal reality.

#### D CONCENTRATION CONTROL

This final Section of Chapter 4 deals with the question of whether Article 86 can be used to provide some form of Community control over mergers, takeovers and other forms of concentration. The position is far from clear and the author does not intend to become involved in the debate at this juncture of this study;

suffice it to say that the jurisprudence of the authorities and their subsequent actings make it possible to argue that the provisions of Article 86 may be sufficient to found such a possibility.

The first, and indeed the only, decided case on the subject is that of Continental Can in 1971<sup>62</sup> and the subsequent appeal to the Court decided in 1973<sup>63</sup>. In its Decision the Commission stated that<sup>64</sup> :-

"The purchase of a majority shareholding in a competing undertaking by an undertaking or a group of undertakings which have a dominant position may, in certain circumstances, constitute an abuse of that position".

"For an undertaking in a dominant position to reinforce that position by means of a merger with another undertaking with the consequence that the competition which would have existed actually or potentially in spite of the existence of the initial dominant position is in practice eliminated for the products in question in a substantial part of the common market constitutes behaviour which is incompatible with Article 86 of the Treaty."

From this initial statement, the Commission decided that the acquisition by Continental Can of the competing undertaking Thomassen & Drijver-Verblifa constituted an infringement and ordered that Continental Can put an end to the infringement and submit proposals in that respect to the Commission within six months.

Continental Can appealed to the Court<sup>65</sup>.

In its judgment the Court stated that the central question to the resolution of the case was :-

"Whether the word 'abuse' in Article 86 refers only to practices of undertakings which may directly affect the market and are detrimental to production or sales, to purchasers or consumers, or whether this word refers also to changes in the structure of an undertaking, which lead to competition being seriously disturbed in a substantial part of the common market."

To resolve this question, the Court considered that it was necessary to 'go back to the spirit, general scheme and wording of

Article 86, as well as to the system and objectives of the Treaty'. The distinction between measures which concerned the structure of the undertaking and practices which affected the market could not be decisive, since any structural measure would affect and influence market conditions if it increased the size and thereby the economic power of the undertaking.

"Article 86 is part of the chapter devoted to the common rules on the Community's policy in the field of competition; this policy is based on Article 3 (f) of the Treaty according to which the Community's activity shall include the institution of a system ensuring that competition in the common market is not distorted".

The applicants' arguments that this provision contained only a general programme devoid of legal effect were rejected; Article 3 (f) propounded an aim which was 'indispensable' to the achievement of the Community's tasks. With particular regard to Article 3 (f), the Treaty in several articles contained more detailed provisions for the interpretation of this general aim.

Thereafter the Court stated why Article 86 was expressly relevant to Continental Can's position :-

"But if Article 3 (f) provides for the institution of a system ensuring that competition in the common market is not distorted, then it requires a fortiori that competition must not be eliminated. This requirement is so essential that without it numerous provisions would be pointless".

"In the absence of explicit provisions one cannot assume that the Treaty, which prohibits in Article 85 decisions of ordinary associations of undertakings restricting competition without eliminating it, permits in Article 86 that undertakings, after merging into an organic unity, should reach such a dominant position that any serious chance of competition is practically rendered impossible....If in order to avoid the prohibitions in Article 85, it sufficed to establish such close relations between the undertakings that they escaped the prohibition of Article 85 without coming within the scope of that of Article 86, then, in contradiction to the basic principles of the common market, the partitioning of a substantial part of this market would be allowed."

The Court noted that whilst Article 85 (3) provided a means of maintaining real competition even where certain restraints on competition were permitted, Article 86 did not recognise any exemption from the prohibition. With such a system the requirement to observe the basic foundations of the Treaty - in particular those contained in Article 3 (f) - resulted from the obligatory nature of those requirements. In any event the Court stated that Articles 85 and 86 could not be interpreted in such a way as to contradict each other since they each served to achieve the same goal.

In conclusion, the Court stated that Article 86 was aimed not only at practices which affected consumers directly but also at those which were detrimental to them through their impact on an effective competition structure, such as is mentioned in Article 3 (f) of the Treaty. Abuse could occur if the dominant firm strengthened its dominant position in such a manner that the degree of dominance attained significantly fettered competition - for example, that only firms reliant on the dominant firm were able to remain in the market.

Because of this reasoning the Court dismissed the arguments of Continental Can that there required to be a causal link between the dominant position and its abuse - in the Court's opinion the strengthening of a dominant position might be an abuse prohibited by Article 86 irrespective of the means and procedure by which it was achieved if it had the anti-competitive effects mentioned by the Court.

This is the only statement of the Court on the question of control of concentration by use of Article 86. Arguments which rely on the spirit, general scheme and wording of Article 86 as well

as the basic aims and ideals of the Community as set out in Article 3 of the Treaty are necessarily weak. Although in several instances the Court have referred to Article 3 (f) in their judgments, it is to be noted that the invocation of this provision is in stark contrast to that in, say, Article 3 (d) which provides for the adoption of a common agricultural policy; clearly that provision is of little value when a dispute arises as to the content or nature of that policy. However, it is submitted, Article 3 (f) may be distinguished in that it contains a specific aim - that of ensuring that competition is not distorted. In this way, it differs from Article 3 (d) which merely provides for the adoption of a policy without outlining its aims.

The statement by the Court that Articles 85 and 86 have the same aim is also open to question; Article 85 is concerned with the prevention restriction or distortion of competition within the common market by way of agreement, decision or concerted practice, the result of which will almost certainly be some form of price discrimination - it has nothing to do with market dominance. Article 86 on the other hand concerns abuse of a dominant position. The mere existence or possession of a dominant position is unassailable in Community law; Article 86 is not concerned with restoring competition but with rectifying abuses of the monopoly situation. It could thus be described as being concerned with secondary rather than primary price discrimination.

Article 86 is neutral towards monopoly power or the market structure as such. Its main concern appears to be that of protecting consumers (as that expression is used in its widest sense) against abuse of that power. It, unlike Article 85, is not

concerned with ensuring that competition is not prevented, distorted or restricted or eliminated, nor with ensuring the maintenance of effective competition as the Court argues. Further it cannot be said that any increase in market strength by a dominant firm will be abusive per se, irrespective of market conduct; a restriction in opportunities for growth might detrimentally affect consumers' interests. Article 86 cannot be seen as being directed at a probability of abuse - however likely that may be - but against actual abusive exploitation of that market power which the dominant firm possesses.

The Court is, it is submitted, wrong in considering that Article 86 is an instrument to control 'monopolisation' in the American sense. The Commission may wish it were but it is not. It is concerned as Advocate-General Roemer pointed out, only with abusive conduct.

Mr. Roemer rejected the Commission's arguments and, dissented from the judgment ultimately rendered by the Court, particularly by stating that Article 3 (f) does not provide any clear rules, but it is necessary to refer to Articles 85 and 86 to determine the Community policy towards competition. He notes that Article 86 is not concerned with different degrees of market dominance and will even accept the total absence of competition, i.e. a complete monopoly.

Further Mr. Roemer noted that Article 86 did not declare an attempt to create a monopoly situation to be prohibited as was done in Section 2 of the Sherman Act<sup>66</sup> which according to Mr. Roemer was well known to the draftsmen of the Treaty. In his view, and also that of the author, it was significant that Article 86

unlike Article 66 ECSC and Article 85 (3) (b) does not contain the proviso that 'effective competition' must not be hindered (Article 66 ECSC), or that there must not be the possibility of eliminating competition in a substantial part of the products in question (Article 85 (3) (b) EEC).

In conclusion, Mr. Roemer states that, in principle, Article 86 is not suitable for the purpose of controlling mergers; the Commission should not attempt to solve the important problem of preventing mergers even partially by means of a wide interpretation of Article 86, by bringing within the terms of the law cases where an insignificant vestige of competition is destroyed - which cases are in any event not the most important kind.

As a result of this the Advocate-General advised that the Court should annul the Decision not only on the basis that there was no dominant position (as it established) but also that there had not been any abuse of any position held. However, the Court did not agree.

After the Continental Can judgment, there was a great deal of discussion in legal circles as to the actual state of the law and with the submission of a Commission proposal to the Council for a Regulation on the control of concentration between undertakings in July, 1973<sup>67</sup> it was thought that the Commission had, at least for the time being, decided to approach the merger control problem from a different direction.

The draft Regulation contains extensive provisions to deal with concentration, although it states in the Preamble that 'Article 86 applies to concentrations effected by undertakings holding a dominant position in the common market or in a substantial part of

it which strengthen such position to such an extent that the resulting degree of dominance would substantially restrict competition'. It does, however, make it clear that whilst Article 86 only extends to concentrations which would result in only undertakings dependant on the dominant firm remaining in the market, the aim of the Regulation would be to prevent such concentrations from arising.

The Regulation is, however, in the draft stage. Political pressures combined with the legal problems of instituting a Community-wide system of merger control in spheres where national legislatures are anxious to retain control for national policy reasons, have meant that the Regulation has not been agreed in the Council.

Until 1978, this was the position. However, in the Eighth Competition Report<sup>68</sup> the Commission stated that :-

"In the absence of more suitable merger control arrangements for EEC industries, the Commission continues to exercise Community surveillance of mergers after they have taken place to ensure that they are not contrary to the prohibition on abuse of dominant positions in Article 86 of the EEC Treaty".

"In legal terms the Court of Justice has so far ruled only on a case where a dominant position already held before a merger was strengthened by means of the merger. But the basic considerations set forth in Continental Can refer only in general terms to the need for preserving a borderline beyond which any weakening in competitive forces would jeopardise attainment of the objectives of the common market."

During the year the Commission had considered various complaints by firms who felt that their interests were being prejudiced by mergers involving other firms, but in none of the cases considered did the Commission consider that the circumstances were right for a cease and desist decision.

In the Ninth Report<sup>69</sup>, the Commission reported that its surveillance was continuing but that in some cases, its scrutiny was

at the request of firms wishing to merge and anxious to make sure, beforehand, that they were acting in conformity with the Treaty. However, in none of the cases examined, did the Commission have grounds for action.

Mention should also be made in relation to the question of concentration of partial mergers taking the form of joint ventures, such as that of SHV/Chevron.<sup>70</sup>

In conclusion, the author would mention that the Commission appear to be continuing to examine proposed or actual mergers to determine their compatibility with the provisions of Article 86. Whilst the author would agree with Advocate-General Roemer's statement that Article 86 is concerned only with abusive conduct, the fact that the Commission appear to take a different view should be sufficient for firms to take the Continental Can case into consideration in their merger strategy. If the Commission continues to examine mergers in the way in which the Eighth and Ninth Competition Reports suggest that it is doing, it can only be a matter of time before it requires to take a formal Decision against a merger. Because of the state of the law in this area, it is almost certain that such a Decision would be appealed to the Court who would then have the opportunity to reconsider the whole question.

Having said that however, it may well be that the course of action which will be followed by the Commission in the future will be on the basis of the draft Regulation presently before the Council. This would have the advantage both of providing a set of clear requirements and criteria for the application of the Treaty rules and of removing the arguments which exist as to the applicability of Article 86 at least on the practical level.

FOOTNOTES TO CHAPTER FOUR

1. Decision of 2nd January 1973 on a proceeding under Articles 85 and 86 of the Treaty European Sugar Industry O.J. No. L140, 26th May 1973, p.17; (1973) CMLR D65; CM/M/I/67.
2. Judgment of the Court of 16th December 1975 - Suiker Unie a.o. v EEC Commission - Cases 40-48/73, 50/73, 54-56/73, 111/73, 113-114/73; (1975) ECR 1663; (1976) 1 CMLR 295; CM/M/III/53.
3. Judgment in Suiker Unie a.o. v EEC Commission, cited at Note 2.
4. Judgment of the Court of 21st February, 1973 - Europemballage and Continental Can -v- Commission - Case 6/72; (1973) ECR 215; (1973) CMLR 219; CM/M/III/38.
5. Report by the Commission on the behaviour of the Oil Companies in the Community during the period from October, 1973, to March 1974: Brussels, December, 1975.
6. Flint : Abuse of a Collective Dominant Position, Legal Issues of European Integration; 1978/2, p.21.
7. Decision in European Sugar Industry, cited at Note 1.
8. Judgment in Suiker Unie a.o. v EEC Commission cited at Note 2.
9. Judgment in Europemballage and Continental Can v Commission, cited at Note 4.
10. U.S. Sherman Act 1890; USA/L/I/1.
11. Judgment of 13th February, 1979 - Hoffmann-La Roche -v- Commission - Case 85/76; (1979) ECR 461; (1979) 3 CMLR 211; CM/M/III/77.

12. Press Release in Eurofima of 16th April, 1973, IP (73) 67; CM/M/II/39.
13. Decision in European Sugar Industry, cited at Note 1.
14. Judgment in Suiker Unie a.o. v EEC Commission, cited at Note 2.
15. Decision of 9th June, 1976 on a proceeding under Article 86 of the Treaty Vitamins O.J. No. L 223, 16th August, 1976, p.27; (1976) 2 CMLR D25; CM/M/I/103.
16. Judgment in Hoffmann-La Roche -v- Commission, cited at Note 11.
17. Decision of 19th December 1974 on a proceeding under Article 86 of the Treaty General Motors Continental O.J. No.L29, 3rd February 1975, p.14; (1975) 1 CMLR D20; CM/M/I/83.
18. Judgment of 13th November 1975 - General Motors Continental v EC Commission - Case 26/75; (1975) ECR 1367; (1976) 1 CMLR D20; CM/M/III/50.
19. Decision of 17th December, 1975, on a proceeding under Article 86 of the Treaty United Brands Co. O.J. No. L95, 9th April, 1976, p.1; (1976) 1 CMLR D 28; CM/M/I/100.
20. Decision in United Brands Co., cited at Note 19.
21. Judgment of the Court of 14th February 1978 - United Brands Co. -v- Commission - Case 27/76; (1978) ECR 207; (1978) 1 CMLR 429; CM/M/III/71.
22. Preliminary ruling of the Court on 18th February, 1971 - Sirena -v- Eda - Case 40/70; (1971) ECR 69; (1971) CMLR 260; CM/M/III/20.

23. Preliminary ruling of the Court of 8th June, 1971 - Deutsche Grammophon GmbH -v- Metro-SB-Grossmarkte GmbH KG - Case 78/70; (1971) ECR 487; (1971) CMLR 656; CM/M/III/22.
24. Decision in United Brands Co., cited at Note 19.
25. Judgment in United Brands Co. -v- Commission, cited at Note 21.
26. Decision of 14th December 1972 on a proceeding under Article 86 of the Treaty Commercial Solvents J.O. No. L299, 31st December 1972, p.7; (1973) CMLR D50; CM/M/I/62.
27. Judgment of the Court of 6th March, 1974 - Instituto Chemioterapico Italiano SpA and Commercial Solvents Corporation -v- EEC Commission - Cases 6-7/73; (1974) ECR 223; (1974) CMLR 309; CM/M/III/40.
28. Refusal to Sell; OECD, Paris, 1969.
29. U.S. Sherman Act, 1890; USA/L/I/1.
30. European Study Conference on the United Brands Case, London, May 1978.
31. Decision in United Brands Co., cited at Note 19.
32. Judgment in United Brands Co. -v- Commission, cited at Note 21.
33. Judgment in Suiker Unie a.o. -v- EEC Commission, cited at Note 2.
34. Judgment in Commercial Solvents Corp. -v- EEC Commission, cited at Note 27.

35. Decision of 19th April, 1977 on a proceeding under Article 86 of the Treaty BP/ABG O.J. No. L 117, 9th May, 1977; (1977) 2 CMLR D1; CM/M/I/112.
36. Commission Oil Report, cited at Note 5.
37. Decision in BP/ABG, cited at Note 35.
38. Decision in Commercial Solvents, cited at Note 26.
39. Judgment in Commercial Solvents Corp. -v- EEC Commission, cited at Note 27.
40. Judgment of the Court of 29th June, 1978 - British Petroleum Maatschappij BV -v- Commission - Case 77/77; (1978) ECR 1513; (1978) 3 CMLR 174; CM/M/III/75.
41. Directive 73/238/EEC of 24th July 1973; O.J. No. L228, 16th August 1973, p.1.
42. Decision of 8th December, 1977, on a proceeding under Article 86 of the Treaty, Hugin-Liptons O.J. No. L 22, 25th January, 1978, p.23; (1978) 1 CMLR D 19; CM/M/I/120.
43. Decision in BP/ABG, cited at Note 35.
44. Judgment in British Petroleum Maatschappij BV -v- Commission, cited at Note 40.
45. Judgment of the Court of 31st May, 1979 - Hugin Kassaregister AB -v- Commission - Case 22/78; (1979) ECR 1869; (1979) 3 CMLR 345; CM/M/III/78.
46. Judgment in Hoffmann-La Roche -v- Commission, cited at Note 11.
47. Judgment in Hugin Kassaregister AB -v- Commission, cited at Note 45.
48. Commission Oil Report, cited at Note 5.

49. Decision in BP/ABG, cited at Note 35.
50. Judgment in Commercial Solvents Corp. -v- EEC Commission, cited at Note 27.
51. Judgment in United Brands Co. -v- Commission, cited at Note 21.
52. Judgment in British Petroleum Maatschappij BV -v- Commission, cited at Note 40.
53. Decision in BP/ABG, cited at Note 35.
54. Judgment in Hugin Kassaregister AB -v- Commission, cited at Note 45.
55. Decision in Commercial Solvents, cited at Note 26.
56. Judgment in United Brands Co. -v- Commission, cited at Note 21.
57. Decision in Commercial Solvents, cited at Note 26.
58. Judgment in Commercial Solvents Corp. -v- EEC Commission, cited at Note 27.
59. Decision in United Brands Co. -v- Commission, cited at Note 19.
60. Decision in Hugin-Liptons, cited at Note 42.
61. Judgment in Hugin Kassaregister AB -v- Commission cited at Note 45.
62. Decision of 9th December, 1971, on a proceeding under Article 86 of the Treaty Continental Can J.O. No. L 7, 8th January, 1972, p.25; (1972) CMLR D11; CM/M/I/43.
63. Judgment in Europemballage and Continental Can -v- Commission, cited at Note 4.
64. Decision in Continental Can, cited at Note 62.

65. Judgment in Europemballage and Continental Can -v- Commission, cited at Note 4.
66. U.S. Sherman Act, 1890; USA/L/I/1.
67. Proposal for a Regulation (EEC) of the Council on the Control of Concentrations between undertakings O.J. No. C 92, 31st October, 1973, p.1; CM/L/II/16.
68. Eighth Report on Competition Policy, Brussels, April 1979.
69. Ninth Report on Competition Policy, Brussels, April 1980.
70. Decision of 20th December 1974 on a proceeding under Article 85 of the Treaty SHV - Chevron Oil Europe O.J. No. L38, 12th February 1975, p.14; (1975) CMLR D68; CM/M/I/85.

CHAPTER FIVE

CONCLUSIONS

This study has considered firstly the basic legal concepts and principles on which any consideration of a refusal to supply must be based and thereafter has shown the economic factors which will be relevant to such consideration before turning to a detailed examination of how the Commission and the Court have dealt with the problem. It is a problem which cannot be solved merely by the application of one of these disciplines; rather they must be applied together, possibly in conjunction with another discipline - politics.

Having shown the effect which a refusal to supply may have in cases where the producer is in a dominant position for that item, it can readily be seen that the dominant firm is in a particularly precarious position in its dealings with other enterprises on the market. Whilst being subject to all the rigours and prohibitions of Article 85, the dominant firm must also select its business strategy having in mind that it will require to conform with the requirements of Article 86.

What may be permitted under Article 85 by way of sales and distribution policy may, in certain circumstances, be prohibited in terms of Article 86 as being intended to strengthen a dominant position and thereby - according to the Commission - abusing that position. This is particularly true where the dominant firm wishes to reorganise its distribution system with the resultant termination of business relationships with one or more of its former distributors. It is in this area, in particular, that the dominant firm requires to be especially wary; the dividing line between a permitted refusal to supply and one which is prohibited is not clear where the refusal has been made in order to enable the dominant firm to take over some or all of the distributive functions previously

carried out on its behalf by the refused distributor.

Thus the problems of distribution discussed in Section A of Chapter Four together with those difficulties arising out of Article 85 create real and significant problems for the dominant firm. Section B of Chapter 4 deals with practices which, although not going so far as to be capable of definition as refusals to supply in their purest sense, can be interpreted as constituting implied refusals to supply insofar as they impose on would-be customers terms which amount to refusals to supply -or would do so were it not for the fact that the customers are obliged to purchase from the dominant firm whatever the cost. Such practices are also of importance in a study of refusal to supply in that a refusal to supply, or a threat thereof, is often used as a sanction by the dominant firm to ensure compliance with otherwise abusive - and therefore prohibited - behaviour. Insofar as this is the purpose of the refusal to supply, it will always be prohibited in terms of Article 86 since, per definitionem, a sanction designed to ensure that a type of prohibited behaviour is followed must itself be prohibited.

Section C of Chapter 4, deals with the problem of a refusal to supply itself and offers possible justifications for such a course of action and finally considers the options open to the control authorities to remedy a refusal which is perceived to be abusive. The position is very far from clear and there remain whole areas -notably that of new customers - which have yet to be settled. It is noted in this respect that the present Commission attitude appears to be that dominant firms are obliged to supply all who approach them even if this means reducing supplies to customers who are contractually bound to them. This approach, whilst perhaps

satisfying the exigencies of competition policy, is difficult to reconcile with the law of contract and economic reality.

Section D of Chapter 4, whilst not directly applicable to the question of refusal to supply, illustrates the problems of the control authorities in counteracting certain types of behaviour. In this sphere, there is also the problem of whether or not Article 86 is able to be applied in the control of mergers; the Commission and the Court in *Continental Can* thought that it was; Advocate-General Roemer in that case, and many legal commentators since, considered that it was not - Article 86 was only designed to prevent exploitation, not to deal with the way in which market dominance was achieved. It is with this latter view that the author would concur. However, for the practitioner called upon to advise his clients as to whether or not their behaviour or proposed behaviour will fall foul of the Treaty's antitrust rules, the question is an academic one. What is important from the client's point of view is what the control authorities consider the position to be - and that can only be seen from the one decided case and the numerous press releases on informal proceedings since that time - since it is these authorities who will issue the statement of complaint, take the Decision and settle the case. The fact that there exists a possibility of appeal to the Court for the annulment of the Commission Decision is not a factor which should hold much sway in the initial stages. The costs of such a course of action, even if successful, is such that an attempt should be made to comply rather than confront. This realisation on the part of large firms would explain why the Eighth and Ninth Competition Reports draw attention to the numbers of mergers which have been referred to the Commission for some form of 'OK' as far as it is concerned.

Finally mention will be made of the public utility approach argument. Such an approach implies the existence of a set of preferred objectives which are to be striven for by the administrators of the policy; it is for this reason that the approach is confronted with a series of difficulties. If the competition policy is seen as a part of the Community's overall strategy with objectives such as growth, full employment and price stability or with combatting inflation as was stated in the First Competition Report, one is immediately confronted with a major difficulty; there exist no testable, systematic and constant relationships between market structure, conduct and behaviour, performance and macro-economic targets which would enable one to state, with a reasonable degree of certainty, that the market is competitive in the sense that there exists no practicable alteration in market structure that would make attainment of the objectives more probable.

Secondly as Jacquemin has pointed out, the available evidence is confusing; there is no simple method of distinguishing between monopoly profits and the results of particularly efficient management, low profits due to competitive pressures and those due to poor performance and inefficiency. Also since there exists a plethora of public preference, various degrees of public interest and consumer welfare, the choice will require a political compromise between conflicting and immeasurable values. In a free market economy such as that which exists in differing degrees in all the Member States, who is to decide how resources are to be allocated and whether a change in such allocation would lead to greater consumer welfare?.

The vagueness of this approach and of a public interest type

exemption system under Article 85 may serve to illustrate the problems faced in applying that provision and, it is submitted, any attempt to apply some form of public interest criterion would involve a political choice which is outwith the ambit of the Commission's brief. A realisation of this problem is shown by the Commission's unwillingness to become embroiled in price regulation (it does so in United Brands although it denies doing so) and by its attempts to use Article 86 as a means of preventing the consolidation and strengthening of dominant positions, so preserving the market structure status quo. Such matters emphasise the shortcomings of Article 86 and, if the Community's approach toward dominant positions is to change - and it is submitted, free market enterprise may be better served by some form of antitrust policy similar to that in the United States - Article 86 will have to change with it.

The antitrust policy approach is not one of regulation, such as the public utility argument, but one of ensuring the maintenance of sufficient competition on the market so that market forces of supply and demand will ensure desirable economic performance however that may be defined. Such a statement is somewhat simplistic but, unlike Article 86, it provides merely a general goal leaving it to the administrators of the policy through implementing legislation or judicial determination to determine what measures are necessary to keep the policy on course.

This decision, like so many in the competition law field, is not a legal one but is for the politicians; it is they who must decide what the competition law is to achieve and how the potentially detrimental effects mentioned in Chapter Three are to be avoided; what are the economic 'norms' against which performance or

behaviour is to be measured; and what are to be the sanctions to be imposed for non-compliance with the rules. It is in implementing these policy decisions, or in advising the politicians on the feasibility of the proposed course of conduct, that the lawyers have a role.

In conclusion, it is submitted that the practice of the Commission and the Court, as detailed in Chapter Four, has begun to clarify the concept of 'refusal to supply' by providing examples of the cases where this will or will not constitute an abuse of a dominant position within the meaning of Article 86 of the Treaty. The problem however, is twofold; firstly the Commission have not had their reasoning upheld by the Court in all cases; and, secondly, there are as yet too few cases to enable general conclusions to be drawn. In all the cases to date the decision which was reached depended to a great extent on the particular fact situation and in the absence thereof the position might be different. There also remain areas where a refusal to supply could occur which have not been dealt with by the Commission or the Court and for which the position is arguably still open. In this respect reference is made to the problem of the supply of new customers, to supply in times of crisis or shortage and to the problem of oligopoly.

It is doubtful, in the absence of any clear policy lines from the Commission whether there is any increased certainty or predictability in 'refusal to supply' or 'supply' as a result of the jurisprudence although the Commission's approach does tend to support the economic assumptions drawn in Chapter Three. As more jurisprudence emerges, it is likely that a more exact determination of the position will be possible but this is likely to take some considerable time in the present situation within the Commission

with its limited staff resources.

It is not possible to state that any of the three elements, economics, law or policy, is the more significant in the determination of a refusal to supply. Each is relevant to a different extent in every case. For the practitioner the only safe course is probably to have regard for the jurisprudence of the Commission and the Court, both formal and through the medium of the annual Competition Reports and also, if possible to maintain either individually or through an interest group adequate channels for contact and discussion with the Commission on an informal basis to obtain pointers as to its future intentions.

APPENDIX I

Article 85 1. The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:

- (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
- (b) limit or control production, markets, technical development, or investment;
- (c) share markets or sources of supply;
- (d) apply dissimilar conditions to equivalent transactions with other trading parties thereby placing them at a competitive disadvantage;
- (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subjects of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings;
- any decision or category of decisions by associations of undertakings;
- any concerted practice or category of concerted practices; which contributes to improving the production or distribution of goods or to promoting technical and economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

- (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
- (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Article 86 Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- (b) limiting production, markets or technical development to the detriment of consumers;
- (c) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their very nature or according to commercial usage, have no connection with the subject of such contracts.

APPENDIX II

Regulations relative to Competition Law

1. Regulation No. 17/62/EEC of the Council of 6 February 1962; J.O. No. 13, 21 February 1962, p. 204; O.J. (Special Edition 1959 - 1962) p.87; CM/L/II/1.
2. Regulation No. 26/62/EEC of the Council of 4 April 1962; J.O. No. 30, 20 April 1962, p. 993; O.J. (Special Edition 1959 - 1962) p. 129; CM/L/II/2.
3. Regulation No.27/62/EEC of the Council of 3 May 1962; J.O. No. 35, 10 May 1962, p. 1118; O.J. (Special Edition 1959 - 1962) p. 132; CM/L/II/3.
4. Regulation No. 141/62/EEC of the Council of 26 November 1962; J.O. No. 124, 28 November 1962, p. 2751; O.J. (Special Edition 1959 - 1962) p. 291; CM/L/II/6.
5. Regulation No. 99/63/EEC of the Commission of 25 July 1963; J.O. No. 127, 20 August 1963, p. 2268; O.J. (Special Edition 1963 - 1964) p. 47; CM/L/II/7.
6. Regulation No. 19/65/EEC of the Council of 2 March 1965; J.O. No. 36, 6 March 1965, p. 533; O.J. (Special Edition 1965 - 1966) p. 35; CM/L/II/8.
7. Regulation No. 67/67/EEC of the Commission of 22 March 1967; J.O. No. 57, 25 March 1967, p. 849; O.J. (Special Edition 1967) p. 10; CM/L/II/9.
8. Regulation No. 1017/68/EEC of the Council of 19 July 1968; J.O. No. L 175, 23 July 1968, p. 1; O.J. (Special Edition 1968 I) p. 302; CM/L/II/10.

9. Regulation No. 1629/69/EEC of the Commission of 8 August 1969; J.O. No. L209, 21 August 1969, p. 1; O.J. (Special Edition 1969 II) p. 371; CM/L/II/11.
10. Regulation No. 1630/69/EEC of the Commission of 8 August 1969; J.O. No. L209, 21 August 1969, p. 11; O.J. (Special Edition 1969 II) p. 381; CM/L/II/12.
11. Regulation No. 2821/71/EEC of the Council of 20 December 1971; J.O. No L285, 29 December 1971, p. 46; O.J. (Special Edition 1971 III) p. 1022; CM/L/II/13.
12. Regulation No. 2779/72/EEC of the Commission of 21 December 1972; J.O. No. L292, 29 December 1972, p. 23; O.J. (Special Edition 28 - 30 December 1972) p. 80; CM/L/II/14.
13. Regulation No. 2988/74/EEC of the Council of 26 November 1974; O.J. No. L 319, 29 November 1974, p. 1; CM/L/II/15.
14. Regulation No. 2903/77/EEC of the Commission of 23 December 1977; O.J. No. L 338, 28 December 1977, p. 14; CM/L/II/17.

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